14-708

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 901.

THE UNITED STATES, APPELLANT,

vs.

JOHN BARNETT AND BENJAMIN F. CALDWELL, DOING BUSINESS UNDER THE FIRM-NAME AND STYLE OF J BARNETT & COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 14, 1881.

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INDEX.

	Original.	Print.
Petition, filed February 18, 1881	1	1
Traverse, filed February 25, 1881	2	1
Motion to amend petition, filed May 12, 1881	3	2
Findings of fact and conclusion of law	4	2
Opinion of the court	5	3
Judgment of the court	8	6
Application for and allowance of appeal	9	6
Certificate	10	6

1 Court of Claims, December term, 1880.

J. BARNETT AND COMPANY
vs.
THE UNITED STATES. } No. 12410.

I.—*Petition.*—*Filed Febr'y* 18, 1881.

To the honorable Court of Claims:

J. Barnett & Company respectfully prefer their petition, to wit:

First. That the members of the said firm are citizens of the United States and of the State of Kentucky, and that said firm has at all times borne true allegiance to the Government of the United States, and never in any way aided, abetted, or given encouragement to rebellion against the United States.

Second. That on the 18th day of December, 1880, the Commissioner of Internal Revenue certified an allowance, under the provisions of section six of the act of March 1, 1879, of the refund of $446.99 tax paid by the said firm "on deficiency in spirits," caused by an "unavoidable accident." That the "Fifth Auditor's report" based upon the said allowance also showed the sum of $446.99 due to the said firm; but that the First Comptroller refused to allow the said claim, for which reason it remains unpaid.

Your petitioners therefore aver that they are entitled to receive from the United States the sum of $446.99; wherefore they pray judgment for that amount.

GEO. L. DOUGLASS,
Attorney for J. Barnett & Company.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, a notary public in and for the District aforesaid, George L. Douglass, to me personally known, who made oath in due form and according to law that the statements made in the foregoing petition are true, and that no assignment or transfer of the claim as herein set forth, or any part thereof, or interest therein, has ever been made, to the best of his knowledge and belief.

Witness my hand and seal this 18th day of February, 1881.

[SEAL.] MACDONALD DOUGLASS,
Notary Public.

2 II.—*Traverse.*—*Filed Feb'y* 25th, 1881.

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petitition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney-General.

3 III.—*Motion to amend petition.—Filed & allowed May* 12, 1881.

Now comes George L. Douglass, attorney for the said claimants, and moves the honorable court for leave to amend the petition filed in the said cause by inserting after the words "To the honorable Court of Claims" the following: "John Barnett and Benjamin F. Caldwell, doing business under the firm-name and style of," and that he have leave to amend as above set forth without reprinting the said petition.

GEO. L. DOUGLASS,
Attorney for Claimants.

MAY 12, 1881.

Allowed.

C. D. D.

4 IV.—*Findings of fact and conclusion of law.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. On the 18th day of December, 1880, the Commissioner of Internal Revenue, on appeal to him made, and in accordance with the regulations prescribed by the Secretary of the Treasury, upon evidence satisfactory to himself, made and certified for payment the following allowance for refund and payment back to the claimant of certain taxes, under the provisions of the statute therein referred to:

A schedule of claims for the refunding of taxes erroneously assessed and paid, which have been assessed and allowed.

District.	Claimants.	Amount.
5th Ky....	J. Barnett and Co	$446 99
	Total	$446 99

"I hereby certify that the foregoing claim for the refunding of taxes assessed and paid have been examined and allowed under the provisions of section 6 of the act of March 1st, 1879.

"GREEN B RAUM,
"*Commissioner.*

"OFFICE INTERNAL REVENUE, *Dec.* 18*th*, 1880."

II. In compliance with one of the regulations prescribed by the Secretary of the Treasury, that "where the case of an appeal involves an amount exceeding $250, and before it is finally decided, the Commissioner will transmit the case, with the evidence in support of it, to the Secretary of the Treasury for his consideration and advisement," the Commissioner submitted the claimants' appeal to the Secretary, and received the following approval:

"TREASURY DEPARTMENT,
"OFFICE OF THE SECRETARY,
"*Washington, D. C., Dec.* 16, 1880.

"Honorable GREEN B. RAUM,
"*Commissioner of Internal Revenue:*

"SIR: Your letter of the 11th instant is received, with which you

transmit for my consideration and advisement the claim of Messrs. J. Barnett and Company, distillers, of Antioch, 5th district of Kentucky, for the refunding of $446.99, being deficiency taxes paid by them for March, May, and June, 1874, with penalty and interest.

"It appears that by unavoidable and unforeseen accident the fermenting-tubs, which seemed to be well and properly built, unaccountably swagged at the bottoms, opening the cracks where the boards were joined, and causing a gradual and continual wastage of material. These tubs being sunk three and a half feet in the ground, the cause of the leakage which produced the deficiency was not discovered until May 2d, 1874, when they were promptly repaired. The wastage, however, continued, and on June 10th, 1874, they suspended work.

"No other cause for the deficiency was shown or suspected, and it does not appear to have been occasioned by want of diligence or any fraudulent purpose of the claimants. This cause would seem to be an adequate one to produce the deficiency, and such as would entitle the claimants to relief under section 6 of the act of March 1, 1879. I, therefore, approve the allowance of the sum of four hundred and forty-six $\frac{99}{100}$ dollars ($446.99), as proposed by you.

"The papers are herewith returned.

"Very respectfully,

"H. F. FRENCH,
"*Acting Secretary.*"

III. Said certificate of allowance has been duly presented, through the accounting officers of the Treasury, for payment, and has not been paid.

CONCLUSION OF LAW.

Upon the foregoing facts the conclusion of law is that the claimants have judgment for $446.99, on the ground set forth in the following:

V.—Opinion of the court.

DRAKE, Ch. J., delivered the opinion of the court.

But one question is involved in this case, and that we think has been, in effect, decided by this court and the Supreme Court of the United States; not under the particular statutory provision here involved, but under another so similar in the authority conferred upon the Commissioner of Internal Revenue that the decisions rendered under it may fairly be held directly applicable here.

Four cases of this description have been before us, in each of which we were called upon to declare our judgment upon the effect of section 3220 of the Revised Statutes, which, so far as it defines the powers of the Commissioner of Internal Revenue, is as follows:

"SEC. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected."

In each of those four cases the Commissioner made an allowance of a refund of taxes illegally assessed; in each of them the Comptroller of the Treasury refused to pass the claim; and in each of them this court

gave the claimant judgment for the amount which the Commissioner had allowed. (Kaufman's case, 11 C. Cl's R., 659; Woolner's case, 13 ibid., 355; Bank of Greencastle's case, 15 ibid., 225; and Real Estate Savings Bank of Pittsburgh's case, ante .)

Only one of those cases—that of Kaufman—has been passed upon by the Supreme Court of the United States, and in that our judgment was affirmed; the Chief Justice, in the opinion of the court, thus expressing their view of the law:

"It is now insisted that the finding of an allowance by the Commissioner is not enough, and that the court should have gone behind the allowance and found the facts in respect to the original claim.

"Such we think is not the law.

"To say the least, the allowance of a claim under this statute is equivalent to an account stated between private parties, which is good until impeached for fraud or mistake.

6 "It is not the allowance of an ordinary claim against the government by an ordinary accounting officer, but the adjudication by the first tribunal to which the matter must by law be submitted.

"Until so submitted, and until so adjudicated, there is not even a prima-facie liability of the government; but when submitted and when allowed upon the adjudication the liability is complete until in some appropriate form it is impeached.

"When, therefore, the court found the adjudication against the government, without impeachment, the liability to pay was established.

"We do not decide that in the Court of Claims the adjudication of the Commissioner may not be impeached, but we do decide that until impeached it is binding, and that the affirmative of the impeachment is upon the government." (96 U. S., 570.)

As regards the powers conferred on the Commissioner by section 3220, and the legal effect of his allowance of a refund of taxes illegally assessed, we hold the matter settled by that language of the Supreme Court.

The present case arises under section 6 of the act of March 1, 1879, "to amend the laws relating to internal revenue" (20 Stat. L., 327), which section is as follows:

"SEC. 6. That whenever, under the provisions of section thirty-three hundred and nine of the Revised Statutes, an assessment shall have been made against a distiller for a deficiency in not producing eighty per centum of the producing capacity of his distillery, as established by law, or for the tax upon the spirits that should have been produced from the grain, or fruit, or molasses found to have been used in excess of the capacity of his distillery for any month, as estimated according to law, such excessive use of grain, or fruit, or molasses having arisen from a failure on the part of the distiller to maintain the capacity required by law to enable him to use such grain, or fruit, or molasses without incurring liability to such assessment, and it shall be made to appear to the satisfaction of the Commissioner of Internal Revenue that said deficiency, or that said failure, whereby such excessive use of grain, molasses, or fruit arose was not occasioned by any want of diligence or by any fraudulent purpose on the part of the distiller, but from misunderstanding as to the requirements of the law and regulations in that respect or by reason of unavoidable accidents, then, and in such case, the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal made to him, to remit or refund such tax, or such part thereof as shall appear to him to be equitable and just in the premises."

Under this section the Commissioner of Internal Revenue made the allowance in question, being deficiency taxes paid by the claimants, with penalty and interest; which deficiency resulted from unavoidable and unforeseen accident, without want of diligence or any fraudulent purpose of the claimants, as declared by the Secretary of the Treasury in his letter approving the Commissioner's allowance.

Comparing the terms of section 3220 with those of the act of 1879, no one can fail to note the essential identity of the two grants of power to the Commissioner.

In the former the granting words are—

"The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, &c."

In the latter the granting words are—

"Whenever * * * it shall be made to appear to the satisfaction of the Commissioner of Internal Revenue that said deficiency * * * was not occasioned by any want of diligence or by any fraudulent purpose on the part of the distiller, * * * then, and in such case, the Commissioner, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal made to him, to remit, &c."

The difference in terms between these two grants of authority is the use, in the latter, of the words "whenever it shall be made to appear to the satisfaction of the Commissioner;" but this refers merely to the occasion when the granted power may be exercised, and not to the extent, operation, and effect of the power. In each case the power is to remit, &c.; in each it is to be exercised on appeal made to the Commissioner; and in each it is to be exercised subject to regulations prescribed by the Secretary of the Treasury.

When, in the act of 1879, it was prescribed that certain things should be "made to appear to the satisfaction of the Commissioner," as a condition precedent to the exercise of the power there granted, it was only an expression of what the law would imply from the language of section 3220, as a condition precedent to the exercise of the power therein bestowed.

So, not only in terms, but in legal effect, the power of the Commissioner is the same under the two statutes, but to be exercised in different cases and over different subjects-matter.

Such being the case, we are clear in holding that the above-cited language of the Supreme Court is to every intent as applicable to this case as if it had been uttered therein, and that the allowance now before us is "an adjudication" in favor of the claimant, upon which "the liability" of the United States "is complete until in some appropriate form it is impeached;" and no attempt was made at the trial to impeach it.

That the accounting officers of the Treasury refuse to certify for payment the Commissioner's allowance is wholly immaterial. Congress has intrusted the power of making such an allowance to the judgment and discretion of the Commissioner, subject to the regulations prescribed by the Secretary of the Treasury. In this case those regulations have been complied with, and the Secretary has approved the allowance. The case is substantially like that of United States vs. Jones (18 Howard, 92). Jones, a lieutenant in the Navy of the United States, was in Paris, France, in December, 1851, on leave of absence, and was severely and dangerously wounded by accident during the revolutionary outbreak in that month. In July, 1852, he was placed by the Secretary of the Navy on special duty, for the collection of information relative to

the steam navy of France. Afterwards, in August, 1852, the sum of $1,000 was transmitted to him by the Secretary of the Navy, with orders to apply it "to discharge the expenses attending the injuries received by him in Paris," and the money was disbursed according to that order. The accounting officers of the Treasury charged the amount so disbursed by Jones against him on his pay account, and refused to recognize the authority of the Secretary of the Navy in the premises. The Supreme Court sustained his action, and overruled that of the accounting officers, and said: "The liability of the defendant to refund this money to the government is founded on the act of the accounting officer charging him with it, because, in his opinion, the Secretary of the Navy had mistaken the law or abused his discretion. His acts and decisions on subjects submitted to his jurisdiction and control by the Constitution and laws do not require the approval of any officer of another department to make them valid and conclusive. The accounting officers of the Treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of the heads of departments."

Under these rulings of the Supreme Court we can do no less than order, as we do, a judgment in favor of the claimants for the amount of the allowance, $446.99.

8 VI.—*Judgment of the court.*

At a Court of Claims held in the city of Washington on the 23rd day of May, A. D. 1881, judgment was ordered to be entered herein as follows:

The court, on due consideration of the premises, find for the claimants, and do order, adjudge, and decree that the said J. Barnett and B. F. Caldwell do have and recover of and from the United States the sum of four hundred and forty-six $\frac{99}{100}$ dollars ($446.99).

9 VII.—*Application of defendants for and allowance of appeal.—Filed June* 10, 1881.

From the judgment rendered in the above-entitled cause on the 23rd of May, 1881, in favor of claimant, the defendants, by their Attorney-General, on the 10th day of June, 1881, make application for and give notice of an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Assistant Attorney-General.

Allowed.

C. D. DRAKE, *C. J.*

10 VIII.

In the Court of Claims.

J. BARNETT AND COMPANY
vs.
THE UNITED STATES. } No. 12410.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the final judg-

ment of the court, of the application by the defendants for allowance of appeal to the Supreme Court of the United States, and of the allowance of same by Chief Justice Drake.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this thirteenth day of September, A. D. 1881.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 901. The United States, appellant, vs. John Barnett & Benjamin F. Caldwell, doing business under the firm-name & style of J. Barnett & Company. Court of Claims. Filed 14th September, 1881.

FILED
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SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1881.

THE UNITED STATES, *Appellant*,
vs.
THE REAL ESTATE SAVINGS BANK OF PITTSBURGH.

Appeal from the Court of Claims.

23d.

[Reported in 16 Court of Claims, 335.]

WILLIAM LAWRENCE, for the United States, by request of the Solicitor-General, argued this case in the Supreme Court January 19, 1882, making the points hereafter stated.

MATERIAL FACTS.

July 10, 1878, the bank paid to the collector of internal revenue tax on deposits, $972.69.

July 9, 1880, the bank presented to the collector a claim for the refund of this sum.

July 15, 1880, the collector made the certificate thereto required by regulations, and mailed the claim to the Commissioner of Internal Revenue at Washington.

July 17, 1880, the claim reached the office of the Commissioner in Washington.

October 13, 1880, the Commissioner submitted the claim to the Secretary of the Treasury, by whom it was approved the next day.

October 21, 1880, the Commissioner "examined and allowed the claim."

The record shows that the allowed claim was presented through the accounting officers, and payment was refused. The record does not show, but the fact is that—

October 25, 1880, the Fifth Auditor examined and adjusted the claim. (Rev. Stats., 277, cl. 6.)

November 12, 1880, the First Comptroller declined to certify a balance due claimant. (Rev. Stats., 191, 269.)

If these facts are material for the rights of the claimant, it is supposed the Solicitor-General will concede them.

The claimant sued in the Court of Claims, recovered judgment, and the United States appealed to the Supreme Court.

The action is brought under the Revised Statutes (section 1059). The authority of the Commissioner is found in sections 3220, 3228, and a "regulation," declaring that "claims for the refunding of taxes erroneously assessed and collected SHOULD be presented THROUGH the collectors of the respective districts upon blank form No. 46."

POINTS OF ORAL ARGUMENT AND AUTHORITIES FOR THE UNITED STATES.

I will discuss two propositions:

I.—The claim in this case was barred because not presented at the office of the Commissioner of Internal Revenue in Washington within two years.

1. The statute says such claim "*must* be presented *to the Commissioner of Internal Revenue* within two years next after the cause of action accrued." (Rev. Stats., 3220.) The Commissioner is an officer, and has an office "*in* the Department of the Treasury" (Rev. Stats., 319), and this "shall be at the seat of Government" (Washington). (Rev. Stats., 233.) The claim is to be "settled and adjusted *in the Department* of the Treasury." (Rev. Stats., 236.) Effect is to be given to the words as *they are*, "not importing * * * words * * * not found there." (92 U. S., 751.) A presentation at Pittsburgh is not a presentation "*in* the Department of the Treasury."

The decision of this question may be far reaching.

The "Treasury of the United States" is "*in* the Treasury building," and *there* the Treasurer peforms his duties. (Rev. Stats., 3591.)

Banks are required to make returns for taxation "to the Treasurer." (Rev. Stats., 5215.)

Can the banks be in any form relieved of this duty? If so, the Treasurer may be unable to perform duties required by statute.

If for the convenience of the banks a regulation is made (Rev. Stats., 161) *permitting* them to make reports "*through*" a sub-treasurer, are the banks relieved of the duty to still make them "*to* the Treasurer"?

Many other cases might be cited.

2. The "*regulation*" does not change this. It says, claims "*should* be presented *through* the collector." "*Should*" is not "*shall*," and, if so, "*through*" is not "*to*." This *permits* presentation *through* a collector, but contemplates presentation *to* the Commissioner. The regulation is to be construed in harmony with the statute, which gives the *claim-*

ant a *right* to present *directly* to the Commissioner, but permits a collector to aid him.

3. The record shows that the presentation to the Commissioner was not made within two years. The Commissioner had no power to receive the claim after that, and any action thereon was *ultra vires*. An officer cannot waive a right denied by statute. (Andrae *vs.* Redfield, 12 Blatchf., 407; United States *vs.* McKnight, 98 U. S., 179; 12 Pet., 527.) The claim is, as said in Kaufman's case (96 U. S., 570), "impeached for * * * mistake."

4. The duty imposed by statute on the Commissioner cannot be delegated to a collector. *Delegata potestas non potest delegari.*

It is the right of the claimant to have the privilege of presenting his claim at the office of the Commissioner.

5. A claimant cannot impose a duty on a collector to receive a claim. Official duties are fixed by law. (Ames *vs.* Huron, L. & B. Co., 11 Mich., 147; Cooley, Const. Lim., [363,] 451.)

II.—The allowance of the Commissioner does not give a *prima facie* right of action in the Court of Claims having jurisdiction of "claims founded upon any law of Congress" or "upon contract" (Rev. Stats., 1059.)

The *test*, whether such allowance gives such right, is this: Is it evidence of a "promise on the part of the United States to pay" (United States *vs.* Kaufman, 96 U. S., 569), or an award showing a debt due; that is, does it *per se* so operate? If it does not, *per se*, impose a duty on all officers charged with duties in relation to it to make payment *without examining the evidence on which it is based*, how can it be said that it is the evidence which the law requires of a right to payment? If *other steps* are *by law* required to secure payment, how can it be, *per se*, *prima facie* evidence of a right to payment? It cannot give such right.

1. The opinion of the learned and able Assistant Secretary of the Treasury, November 30, 1877, was that it was not "the final adjudication of the claim," but "a mere step in the system of internal-revenue laws which provide a complete remedy;" that "the decision of the Commissioner is not made final or conclusive by any statute;" that it is "clearly within the province of the Comptroller * * * to decide whether the opinion of the Commissioner of Internal Revenue was or was not correct both in law and fact." (House Ex. Doc. No. 27, 2d Sess. 45th Cong., p. 43.)

2. The whole *power of the Commissioner* is found in the words, as to the tax in question, "to refund and pay back." This is in connection with a power to "remit" taxes assessed, but not paid.

These words *had a meaning* when first used in the act of June 30, 1864. (13 Stats., 240.) The Commissioner did literally "refund and pay back" "by drafts drawn on collectors of internal revenue." This power was *taken away* by act of March 3, 1865 (13 Stats., 483, sec. 3), and the words "to refund and pay back" became *inoperative*—they ceased to have a meaning. The Commissioner could no longer literally "*pay back.*"

Such claim cannot be paid unless it has been "settled and adjusted in the Department of the Treasury" (Rev. Stats., 236); which settlement and adjustment requires that "the Fifth Auditor shall receive and examine" it (*Id.*, 277, cl. 6), and "settle" it (*Id.*, 269); whereupon the First Comptroller shall re-examine it and "certify the balance" due thereon (*Id.*, 269), if any be found due, which certification is to be registered (*Id.*, 313), whereupon the Secretary of the Treasury shall ssue a warrant on the Treasurer for payment (*Id.*, 248); and not until all this is done can payment be made (*Id.*, 305).

All this is shown in a most learned, lucid, and able opinion by a distinguished judge. (McKnight's case, 13 Ct. Cls., 302.)

The claimant must "pursue the statutory remedy to the end." (United States *vs.* Kaufman, 96 U. S., 569.)

3. If the words "refund and pay back," retained in section 3220, *must* be assigned a meaning, it is *safer*, and more in accordance with the language shorn of its original purpose, to say they mean that the Commissioner shall give his approval of claims for a refund as a mere step in the process of accounting, and as evidence for the consideration of the *accounting officers*, not as evidence of a right in court.

To hold that they authorize the Commissioner to give evidence of a *prima facie* right of action seems objectionable for several reasons:

(1.) The law (Rev. Stats., 989, 3226, 3227) recognizes a remedy by action against a *collector*. It would seem improbable that Congress intended to give a *duplicate* remedy by action on the allowance of the Commissioner.

(2.) If the allowance of the Commissioner gives *prima facie* right of action against the United States, it is not barred until six years (Rev. Stats., 1069), when the Government may have lost the means of impeaching it, whereas Congress seems to have intended to limit the remedy by requiring a presentation within two years to the Commissioner (Rev. Stats., 3228), and for a short period against the collector (Rev. Stats., 983, 3226, 3227).

(3.) A very large proportion of all claims are "approved" or "allowed" by officers in obedience to statute or "regulations."

In the accounting system of the Treasury Department, such approval or allowance does not give a *prima facie* right to payment with accounting officers, but is the mere opinion of the officer on the evidence presented.

The accounting officers are required by statute to examine *all* claims, and *may*, if not *must*, look to the *sources of evidence* on which the approval or allowance has been made and add their final decision. (Rev. Stats., 184–187, 191, 236, 277, 269.)

The Senate investigation now in progress shows the necessity for this. If such approval or allowance makes no *prima facie* right to payment through the Treasury Department, how can it in an action in court?

And when such approval or allowance is *required only as a step in the process of accounting*, how can it give a *prima facie* right in court? That would transpose its purpose; it would interrupt the process of accounting, withdraw safeguards provided by law, and give a jurisdiction to courts to absorb the executive functions of the Treasury Department. The accounting officers are charged with the duty "of revising the judgments and correcting the mistakes" of all officers in approving claims, unless such approval is by some statute, in terms or by necessary inference, made *conclusive*. (1 Op., 624, 680; 2 Op., 507; 10 Op., 5.) Unless this be so, the accounting system is a meaningless, fruitless, naked formality, without purpose or efficacy? It is the play of Hamlet with Hamlet omitted.

The approval of this claim by the Commissioner is totally unlike a quartermaster's voucher, which is *prima facie* evidence, authorized by statute, of a debt due by an authorized contract.

The approval of the Commissioner has no element of a contract. He is not authorized to contract. The purpose of his approval is not to finally fix a liability.

(4.) It will enable a claimant to withdraw from the Government the benefit of an examination by the proper accounting officers. It would seem improbable that Congress intended to enable a claimant to do this. It may fairly be supposed that this would result in injury to the public service.

It should require *clear language* to produce such a result.

Whenever Congress has intended to withdraw from this supervision any class of cases, it has been done in very explicit language. (Rev. Stats., 48, 1089, 1911.)

"Rates" of "labor to be fixed by the Secretary." (Act March 3, 1881, 21 Stats., 438.)

4. The question now made is not decided in the Kaufman case (96 U. S., 569). That was not, as this case is, for a refund of a money tax.

The decision rested on section 3426, Revised Statutes, which gave the *Commissioner* power to make regulations "for the *allowance*" of claims. He was authorized to make the allowance "by giving other stamps."

The power to "*allow*" a claim is certainly greater than that to "refund and pay back", *shorn of the means of doing so.*

Then, section 3426 left the Commissioner with the *power to pay* his allowance, which shows that his allowance was intended to be complete.

5. The case of McKnight *vs.* United States (13 Court of Claims, 306) holds that a claimant can, by departmental proceedings previously to the issuing of a draft, "gain no new rights thereby," "upon which actions can be brought." The allowance in this case was such a proceeding. "The decisions of the Internal Revenue Commissioner can hardly be denominated judicial constructions." (17 Wall., 237.)

6. The statute does not charge the Secretary of the Treasury with a duty to examine and allow these claims. The very proper "regulation" on the subject is a great safeguard, but it is not supposed that it relieves accounting officers of their duties.

7. The argument in the support of this claim assumes a position which, if sustained, is believed to be dangerous to the public service. It assumes that the *allowance of the Commissioner is conclusive* on the accounting officers. On this it may be remarked—

(1.) No such question arises in this case. The question is, what right does the allowance give the claimant when he goes into court; not what effect does it have on accounting officers?

(2.) The Kaufman case, in the Supreme Court, decided no question as to the effect of the Commissioner's allowance on accounting officers. It was not necessary to decide that question. Why introduce it now?

(3.) Since the question is made in argument, and has received some apparent sanction (Real Estate Savings Bank case, 16 Ct. Cls., 343; Barnett's case, *Id.*, 521), though the question perhaps did not seem to formally arise, it may be proper to refer to it.

The Comptrollers are not *ministerial* officers as to any claims, except those fixed by positive statute, as in sections 48, 1089, &c., of the Revised Statutes, and as to fixed salaries, or in cases where a power is specifically given to some other officer to conclusively determine rights. (Allen *vs.* Blunt, 3 Story, 745; Martin *vs.* Mott, 12 Wheat., 19.)

So it is properly said in United States *vs.* Jones (18 Howard, 95), as to one officer—and it is applicable to all—that "his acts and decisions on

subjects submitted to his [exclusive] jurisdiction and control by the Constitution and laws do not require the approval of any officer of another Department to make them valid and conclusive."

The jurisdiction here referred to means *exclusive* jurisdiction.

It is then said that—

"The accounting officers of the Treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of the heads of Departments."

Whether in that case the accounting officers had authority to revise an allowance made by the Secretary of the Navy or not, is now immaterial. But when no statute expressly, or by necessary implication, makes the allowance or approval of an officer *conclusive* on accounting officers, they do, on the adjustment of accounts, have "the burden" cast on them, by *positive statute*, "of revising the judgments and correcting the mistakes" of all persons as to such accounts.

Mr. Justice Daniel, in that case, said:

"Each and every officer has his duties to perform, and is bound to their performance with independence and good faith; and no matter whose acts may be brought before him, whether those of his immediate superior, or one much higher in power, he is bound to bring them all to the test of the law."

And he says he knows of "no rule of [official] subordination which can justify * * * a departure from the law."

That case was decided prior to the act of 1868, now section 191 of the Revised Statutes. It was decided when Attorneys-General had been holding that heads of Departments could control the settlement of accounts, but that doctrine has long since been exploded.

This question is set at rest by a decision which will "stand the test of human scrutiny, of talents, and of time," in which it is said:

"We have no officers in this Government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority." (The Floyd Acceptances, 7 Wall., 676.)

An Auditor and Comptroller *authorized by law* to pay a soldier a claim for a lost horse, exercise a power which the President cannot perform, and with which he cannot interfere while such officers remain in office; for he, like the Secretary of the Treasury, is not an "accounting officer." (Real Estate Savings Bank case, 16 Ct. Cls., 343.) It is not a question of *superiority of position*, but of statutory authority.

It so happens that the action of the Commissioner in this case *must*

be acted on by the Fifth Auditor and First Comptroller. (Rev. Stats., 191, 236, 269, 277.) No statute has made his action conclusive on them.

The statute giving the Commissioner his authority does not *repeal* those giving authority to the Auditor and Comptroller. Repeals by implication are not favored. The statute requires the Comptroller to exercise *judgment*, and provides *evidence* on which he may act, and counsel to enlighten him. (Rev. Stats., 184, 185, 187, 269, 277.)

It cannot be supposed that all this is provided without a purpose. The Comptroller exercises such judicial functions that he is not generally liable to *mandamus*. (Decatur *vs.* Paulding, 14 Pet., 515, &c.) He is required to *certify* balances due. (Rev. Stats., 269.) To *certify*—*certum facit*—is to make certain; to exercise judgment. He may be required to re-examine, and again certify. (Rev. Stats., 191.) This is inconsistent with the idea that the action of the Commissioner concludes the Comptroller.

A claimant may prefer to accept a less sum certified by the Comptroller than to sue for a larger sum, approved by the Commissioner. To bind the Auditor and Comptroller conclusively by the action of the Commissioner is to overturn the whole accounting system of the Treasury Department, and to preclude investigation in courts; because, if it is settled that the accounting officers *must accept* the allowance of the Commissioner, no suit in court will ever be necessary, and no means will be left to correct any error of judgment the Commissioner may make.

This would give the judgment of one man a power over accounts contrary to the whole policy of Congress.

If all approvals in the process of accounting are evidences of debt by contract, the Government will be involved in unheard-of liabilities, and subject to a multitude of suits.

The *statute* requires the Auditor and Comptroller to *examine* claims, and the latter is to *certify* the balance due. Their action is made "conclusive upon the executive branch of the Government." (Rev. Stats., 191.) It is thus conclusive on the President, the heads of Departments, and the Commissioner of Internal Revenue.

The statute employs *very explicit language* to secure this conclusive effect.

If this action is conclusive on all these officers, no action of theirs can be conclusive on the Auditor and Comptroller, unless made so by an equally explicit statute, and there is none such.

8. The action of the Auditor and Comptroller concludes no right in court. No such claim can be made. The statute forbids it. (Rev.

Stats., 191.) Courts have an independent authority subject to no executive control. The Court of Claims, with the great ability which has characterized its enlightened and learned decisions, has shown this.

Respectfully submitted:

WILLIAM LAWRENCE,
Of Counsel.

THE UNITED STATES
vs.
JOHN BARNETT AND OTHERS. } No. 901.

Appeal from the Court of Claims.

Reported in 16 Court of Cl. R., 515.

The finding of facts in this case states that the certificate of allowance "has been duly presented through the accounting officers for payment and has not been paid." It is not averred that the First Comptroller has finally passed on this claim—and *he has not.*

The claimant is not entitled to a judgment because he has sued before a refusal of the First Comptroller to certify a balance in his favor.

1. The accounting system gives the claimant a special statutory remedy, and this must be "*pursued to the end*" before a suit can be brought in court.

In United States *vs.* Kaufman (96 U. S., 569), the claimant recovered because it was said "the claimant has pursued the statutory remedy to the end." (State ex rel., &c., *vs.* Marlow, 15 Ohio St., 114.)

2. If the claimant can avail himself of the benefit of a *part* of the special statutory remedy by suing as soon as he obtains the allowance of the Commissioner, he defeats the purpose of Congress in providing for revision by the Auditor and Comptroller. He prolongs his right of action to six years, and defeats the purpose of the limitation of two years (Rev. Stats., 3220) and other limitations provided by law (Rev. Stats., 983, 3226, 3227).

It is impossible to conceive that Congress intended this.

3. Upon the question whether *in such case as this* the Court of Claims has jurisdiction, reference is made to Nichols *vs.* United States, 7 Wall., 122.

4. Congress having given another judicial remedy, it is to be deemed exclusive. (Rev. Stats., 989, 3226, 3227; State ex rel. *vs.* Marlow, 15

Ohio St. R., 114; Com. *vs.* Garrigues, 28 Pa. St., 9; Com. *vs.* Baxter, 35 *Id.*, 263; Com. *vs.* Leech, 44 *Id.*, 332.)

There is filed herewith a decision of the Second Comptroller of February 10, 1851, which may furnish some useful information.

The court is respectfully referred to the exhaustive and able opinion of the learned court in McKnight's case (13 Ct. Cl., 299), as to the mode of adjusting accounts in the Treasury Department.

Respectfully submitted:

WILLIAM LAWRENCE,

Of Counsel for the United States.

SUPREME COURT U.S.
DEC 8 1881
CLERK

In the Supreme Court of the United States.

THE UNITED STATES
v.
REAL ESTATE SAVINGS BANK. } No. 900.

THE UNITED STATES
v.
J. BARNET & CO. } No. 901.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR UNITED STATES.

Ohio St. R., 114; Com. *vs.* Garrigues, 28 Pa. St., 9; Com. *vs.* Baxter, 35 *Id.*, 263; Com. *vs.* Leech, 44 *Id.*, 332.)

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APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR UNITED STATES

THE CASE.

In the first of these cases the claimant presented a claim for the refund of $1,753.32 internal-revenue taxes, which claim was allowed by the Commissioner of Internal Revenue. In compliance with a regulation prescribed by the Secretary of the Treasury under section 3220 Revised Statutes, requiring the Commissioner to transmit to him any claim involving $250, for his consideration the allowance was transmitted to the Secretary and by him approved. Thereupon the allowance went to the accounting officers, and the First Comptroller certified

$780.36 as the balance due the bank. This certificate of balance followed the successive steps prescribed by statute and was paid. The bank then brought suit for the $972.69 disallowed by the Comptroller, the Court of Claims rendered judgment therefor, and from this judgment the United States have appealed.

The tax for which this claim was made was paid on the 10th July, 1878; the claim for refund was filed with the collector on the 9th July, 1880, and was received from him by the Commissioner July 17, 1880. One of the regulations prescribed by the Secretary required claims for refund to be presented "*through*" the collectors of the respective districts.

Upon these facts the Secretary of the Treasury and the Commissioner of Internal Revenue were of opinion that the claim having been filed in season to reach Washington by mail on the 10th July, was to all intents a filing within two years. And this had been the practice of the officers of the Treasury Department for some years. The First Comptroller was of opinion that sec. 3228 required actual presentation to the Commissioner of Internal Revenue within two years, and that this court in the Kauffman case (96 U. S., 567) only went so far as to hold the decision of the Secretary and Commissioner binding upon the Comptroller as to matters of fact, leaving him at liberty to overrule the action of the Secretary on questions of law.

The first ground taken by the court below is that the decision of the Commissioner on the question of time of presentation is conclusive upon *the court* and in the absence of fraud or irregularity could not be set aside.

In the second case above, the claimant sets out no cause of action other than the allowance of the Commissioner

approved by the Secretary, and the court below finds no facts, other than the allowance, approval, and the refusal to pay.

Relying upon the case of United States *v.* Jones (18 Howard, 92), the Court of Claims in both cases holds in substance that the Comptroller has no discretion in the matter of the allowance, and therefore the disallowance by the Comptroller was not an impeachment of the adjudication within the language of the Supreme Court in the case of Kauffman.

ASSIGNMENT OF ERRORS.

The court erred in not dismissing the petitions.

BRIEF.

I.

Although it appears inferentially in the Kauffman case that the United States refused payment of the allowance in his favor, it was not distinctly brought before the court that the Comptroller, as in the Real Estate Savings Bank case, took affirmative action. This court did not there go so far as to say that actual revision of the allowance by the Comptroller would not impair its validity as an account stated.

Section 3210 Revised Statutes requires the gross amount of all taxes collected under the internal-revenue laws to be paid daily into the Treasury without any abatement on account of claims of any description; and sect. 3689 (p. 725, 4th parag. from bottom), makes a permanent annual appropriation to refund and pay back duties erroneously or illegally assessed and collected under the internal-revenue laws. Under the system established by law, before the Treasurer could pay back money on the allowance of the Commissioner of Internal Revenue, the following steps must be taken. The Fifth Auditor receives and examines the account and transmits it to the First Comptroller (sect. 277, par. 6), who examines it and certifies the balance thereon to the Register (sect. 269). The Register then receives the account as finally adjusted, preserves the vouchers and certificate, and

transmits to the Secretary a copy of the certificate of balance (sect. 313). The Secretary, having no power to change or modify this balance (sect. 191), issues a warrant (sect. 248) which is countersigned by the First Comptroller (sect. 269), and recorded by the Register (sect. 313), and without this warrant so countersigned and registered, the Treasurer is forbidden to pay the money (sect. 305).

Among the officers through whose hands the claim successively passes, to wit, the Commissioner of Internal Revenue, the Fifth Auditor, the First Comptroller, the Register, the Secretary, the First Comptroller, the Register, and the Treasurer, there are some whose duties are simply clerical and whose powers extend no further than to inquire whether the forms of law have been pursued, and there are others whose duty is executive or quasi-judicial, and whose power it is to determine the rights of the claimant.

We submit that it is the allowance of the last officer vested with power to inquire into the merits of the claim which makes a prima facie case for the courts.

If, therefore, the First Comptroller, in examining the account, certifying the balance, and "finally adjusting" the claim, has discretion and judgment, with legal power to modify the balance found by the Commissioner of Internal Revenue, his revision of the allowance in favor of the Real Estate Savings Bank destroys all force which the allowance might otherwise have as an account stated. And it is to this inquiry that the present argument will be addressed.

The Comptroller contends that he is the law officer of last resort in the Treasury Department; that to deprive him of the power to overrule the Secretary on matters

of law, is to work a repeal of the chief object of the statute giving power to the First Comptroller. His relations to the heads of departments were definitely settled by this court in United States *v.* Jones (18 Howard, 92), but subsequent to that decision the act of March 30, 1868 (15 Stat., p. 54), was enacted. A *résumé* of the construction put upon the act of 1817, will enable the court to understand the scope and purpose of the act of 1868, now sect. 191, Revised Statutes.

The office of Comptroller was first instituted in 1778; the system adopted for the Treasury Department in 1789 is substantially that provided by the ordinance of Sept. 11, 1781 (Journals of Congress, vol. 3, p. 666, 1 St., 65.) The number of comptrollers and auditors was increased by the act of 1817, an dthe act of 1789 has received numerous amendments; but the relations of the Secretary, Comptroller, Auditor, and Register to each other, as found in sections 248, 269, 277 R. S., are not materially different from those prescribed in 1789. An abstract of so much of the debates of the First Congress as seems pertinent to the present discussion, and extracts from two letters of Alexan der Hamilton are contained in the appendix to this brief.

In 1823 Attorney-General Wirt expressed the opinion that "the settlement of the accounts of individuals by the accounting officers appointed by law is final and conclusive so far as the executive department of the government is concerned"; that "the power ends with the accounting officers, and that the President has no power to interfere." (Opin. Oct. 20, 1823; 1 Opin., 624.) Subsequently, July 27, 1824 (1 Opin., 678), he held that interference with this business, so far from being required

by law, would be a usurpation on the part of the President, which the accounting officers would not be bound to respect. In the case of General Hull and Colonel McKinney (vol 1, pp. 705, 706), Mr. Wirt simply referred to the foregoing opinions.

Attorney-General Berrien, (A. D. 1829, 2 Opin., 302), limited the finality of the decisions of the Comptroller to the accounting officers, and held that the balance certified by the Comptroller "could be set aside by the Secretary, acting (as in matters connected with his department he is presumed to act) by the direction of the President," and pointed out the anomaly of the head of the Department of War being subjected to the control of a subordinate officer of the Treasury.

Attorney-General Taney (A. D. 1832, 2 Opin., 481, 507, 544) was of opinion that the decision of the Comptroller was final, and that the laws required the executive branch of the government to act on it accordingly.

The opinions of Mr. Wirt and Mr. Taney were expressed upon applications to the President to interfere in the settlement of accounts, and their opinions concur in denying such right to the President.

Attorneys-General Butler (A. D. 1834, 2 Opin., 652) and Johnson (1849, 5 Opin., 87) concurred in opinion that the head of a department might direct the accounting officers how an account should be settled, the latter stating that it had been the practice of the government from its origin, for the direction of the Secretaries of the Interior, ordering a payment, to be binding upon all the subordinate officers by whom the account is to be audited and passed. It may be observed in this connection that the case passed upon by Mr. Butler was that

of General Parker, the one considered by Mr. Berrien. The accounting officers refused to be governed by the opinion of the latter and continued their opposition after the opinion of Mr. Butler had been delivered. In December, 1834, General Parker appealed without avail to Congress. (Rep. No. 77, H. R., 2d session, 23d Cong). In 1835 Mr. Butler (3 Op., 23) was of opinion that it was the duty of the accounting officers to disallow a credit in the accounts of the Postmaster-General when in their judgment the payment was unauthorized or contrary to law.

In 1852, Attorney-General Crittenden took up the subject, and, after reviewing the opinions above cited, expressed his opinion as to both of the powers confided to the Comptroller, to wit, countersigning warrants which are warranted by law, and certifying balances after examining accounts (5 Opin., 630):

As to the former, he held that the words "which are warranted by law" do not destroy the meaning of the words "to countersign" nor change the relations of the superior and the subordinate. Attorney-General MacVeagh, passing upon the same expression (opinion of October 22, 1881), says the term "countersign" conveys only the sense of attestation, and by countersigning the warrant the First Comptroller attested to the Treasurer that all the formalities of law had been complied with, and that the signature of the Secretary was genuine; that as to the matter in controversy, to wit, whether the appropriation for artificial limbs should be expended under the War Department or the Department of the Interior, the decision of the Secretary of the Treasury should govern, and not that of the First Comptroller.

As no change has been made since 1852 in the stat-

utes which require the First Comptroller to countersign warrants, that power, as we believe, is not, involved in the present cases.

As to the other branch of the Comptroller's duties, Mr. Crittenden held that the word "final" applied only to the particular jurisdiction wherein the decision shall have been made, and that the heads of departments have a rightful authority to direct allowances to be made, or to reject claims for allowances, in settling and adjusting accounts relating to the business of their respective departments; and that such directions and rejections ought to be conformed to by the Auditors and Comptrollers and Commissioner of Customs, respectively.

In 1855 the case of United States *v.* Jones (18 Howard, 92) was decided, and the question now is, whether that decision is as applicable at present as it was when rendered.

It appears from the debates of Congress (2d session 40th Congress, p. 218) that the particular evil sought to be remedied by the act of 1868, was the refusal of the Secretary of War to issue requisitions for as large amounts as were found due by the accounting officers.

In 1869, Attorney-General Hoar (13 Opin., 6) held that where the question is merely one of computation, the decision of the accounting officers under the act of 1868 is to be regarded as final.

Attorney-General Williams was of opinion (14 Opin., 68) that the act of 1868 was framed to settle all doubts as to the meaning of the act of 1817, and that it was in full accord with the theory maintained by Mr. Wirt.

It is clear that under the act of 1868 (sec. 191, Revised Statutes) the balance certified by the Comptroller cannot

be changed by any officer through whose hands it passes for payment, and that the Treasurer can only pay out the sums so certified. But as to how far his duties in examining and certifying are similar to those of the Register and Treasurer in being ministerial, and as to how far they are judicial, sec. 191 admits of two interpretations:

First, that the statute was intended not only to overturn the opinions of Attorneys-General Berrien, Butler, Johnson, and Crittenden, but also to overrule the case of the United States *v.* Jones; and that, in examining an account, he acts judicially or quasi-judicially, with power to review an interpretation of law by the President, a head of a department, or a bureau officer in whom judgment and discretion is invested by law:

Second, that he is a mere accounting officer, and beyond matters of computation his duties are ministerial; that his absolute power over the funds of the United States is to be exercised in subordination to law with due regard to the executive powers vested by law under the constitution in other officers.

For the former view it is urged—

I. Where Congress meant the decision of the head of a department to be conclusive upon the accounting officers, it has so enacted.

Vide section 2, act of March 1, 1823 (3 Stat., 771), where, in case a difference of opinion arises between the accounting officers, the case is to be referred to the Secretary of War, whose decision shall be conclusive; and, sec. 48, Revised Statutes, which makes the certificate of the President of the Senate and Speaker of the House conclusive upon all the departments and officers of the government.

II. The debates of the First Congress show the great dignity with which the office of Comptroller was regarded, and indicate that this officer was to form a greater check upon the Secretary than would fellow-officers of co-ordinate powers, who with him were to constitute a board a board of finance.

III. There is no force to the language "*the balances * * * shall not be subject to be changed or modified by the heads of departments, but shall be conclusive upon the executive department of the government*," if the decisions, acts, orders, and determinations of the heads of departments, prior to the examination by the Comptroller are binding upon him.

IV. It is expressly declared that his decision shall be conclusive upon the executive department, but it is not enacted in this or any other general statute that the decisions of other officers of the executive shall be binding on him.

V. There are numerous laws relating to contracts, to advances, to extra compensation, and other subjects which relate equally to all the departments. Uniformity in the interpretation of these can only be secured by having one officer to interpret these laws.

The Kauffman case rested upon § 3426, which authorized the Commissioner to make an "*allowance*"; the Savings Bank case rests on sect. 3220, which empowers him "*to remit, refund, and pay back*"; the Burnett case on sect. 6 of the act of March 1, 1879 (20 Stat., 327), which authorizes him "*to remit and refund.*" The words refund and pay back cannot be taken literally. (Sect. 3210, R. S.) When first used in the act of June 30, 1864 (13 Stat., 239, 240), the Commissioner actually did refund

and pay back "by drafts drawn on the collector of internal revenue"; now he can only remit, leaving to other officers of the Treasury the duty of refunding and paying back. And it is for some of them to decide whether the claim was filed in the time prescribed by section 3228, so as to confer on the Commissioner the power of remission.

II.

If the Comptroller has discretion in interpreting the laws and has power to revise the decision of the Secretary and Commissioner, no *prima facie* case has been made out by the official acts in the Treasury Department and the case of the Savings Bank is before the court on its merits.

The allegation in claimant's petition that the tax in question was erroneously paid is traversed by defendant's plea, and examination of the record fails to show that the court has found as a fact that the tax was erroneously paid.

S. F. PHILLIPS,
Solicitor-General.
JOHN S. BLAIR,
For the United States.

APPENDIX.

At the first session of Congress, the House of Representatives being in committee of the whole, Mr. Boudinot (May 19, 1789) moved a resolution that an office be established for the management of the finances of the United States, at the head of which should be an officer to be denominated the Secretary of Finance (p. 384). The resolution gave way to the celebrated discussion of the power of removal. The next day the question came squarely before the committee of the whole as to whether the department should be placed in the hands of a single individual or in a board of commissioners (p. 400), and Mr. Gerry stated the position of the head of the department in the alternative "a comptroller to control his operations with respect to the accounts and vouchers," or the secretary (as in a list of duties read by Mr. Benson on the previous day) to control all the officers in his department. Thus early was the present controversy suggested. The discussion, however, at that Congress was mainly on the choice between a board and a single head. Mr. Madison objected to the former as follows (p. 408): "If a board is established, the independent officers of comptroller and auditor are unknown; you then give the aggregate of these powers to the board, the members of which are equal; therefore you give more power to each individual than is proposed to be intrusted to the secretary." He

also said "he had no doubt but that the officers might be so constituted as to restrain and check each other."

Mr. Baldwin, who subsequently brought in the bill, (p. 408), "was not an advocate of unlimited authority in" the Secretary. "He hoped to see proper checks provided: a comptroller, auditors, register, and treasurer. He would not suffer the Secretary to touch a farthing of the public money beyond his salary. The settling of the accounts should be in the Auditors and Comptroller; the registering them to be in another officer, and the cash in the hands of one unconnected with either." A committee of eleven (p. 412) was elected May 21, to prepare and bring in a bill or bills for the establishment of a Department of Foreign Affairs, a Treasury Department, and a Department of War. Mr. Baldwin, chairman of the committee (p. 436), on the 4th June, reported a bill for the Treasury Department.

When the question arose as to the tenure of the Comptroller, Mr. Madison said (p. 636): "In analyzing its properties [of the office of Comptroller] we shall easily discover they are not purely of an executive nature; it seems to me they partake of a judiciary quality as well as executive; perhaps the latter obtains in the greatest degree. The principal duty seems to be deciding upon the lawfulness and justice of claims and accounts subsisting between the United States and particular citizens; this partakes strongly of the judicial character. Mr. Stone thought it unnecessary to consider the Comptroller as a judge, and give by an express clause in the bill, a right to the complainant to appeal from his decision. He considered this as the right of every man upon the principles of common law; therefore securing; it by statute was the work of supererogation. Mr. Smith,

of South Carolina, thought the Comptroller ought to be independent of the executive, in order that he should not be influenced by that branch of the government in his decisions. Mr. Sedgewick thought he ought to be dependent on the President. Mr. Madison (p. 638) questioned very much whether the executive magistrate "can or ought to have any interference in the settling and adjusting the legal claims of individuals against the United States. The necessary examination and decision in such cases partake too much of the judicial capacity to be blended with the executive. I do not say the office is either executive or judicial; I think it rather distinct from both, though it partakes of each, and, therefore, some modification, accommodated to those circumstances, ought to take place. I would therefore make the officer responsible to every part of the government." Mr. Madison the next day withdrew his proposition, giving the Comptroller a fixed tenure, and it does not appear to have been afterwards presented.

After Alexander Hamilton had been succeeded as Secretary of the Treasury by Oliver Wolcott, he advised the President as to the proper officer to whom should be consigned the temporary execution of the Comptroller's office, made vacant by Mr. Wolcott's appointment as Secretary. That which struck him as the fittest arrangement he did not advise on account of the peculiar personal relations of the Commissioner of Revenue (Mr. Coxe) to Mr. Wolcott. The remainder of the letter is given in full, as presenting the view of the complicated system and divided responsibility of the Treasury Department, held by the first Secretary of the Treasury.

"The Treasurer would by no means answer; because, as the *keeper of the money* it is particularly essential that

all the checks upon him should be maintained in full vigor; and the Comptroller is the officer who, in the last resort *settles* his accounts as well as concurs in the first instance in authorizing by the warrants which are issued by the Secretary, and countersigned by the Comptroller, the payments and receipts of the Treasurer.

"The Register is also one of the principal checks of the *department;* first, upon the Secretary and Comptroller, whose warrants he must register and sign before they can take effect; and secondly, upon the settlements of the Comptroller and Auditor by recording their acts, and entering them on the books to the proper accounts.

"Of any of the officers of the department, except the Commissioner of the Revenue, the business can be best managed through the Auditor, consistently with the preservation of the most material checks, with the restriction I have mentioned this morning, *of his not deciding as Comptroller upon any account he may have settled as Auditor.* The temporary suspension of the final conclusion of the accounts—all the previous examinations going on—cannot be attended with any serious inconvenience. If the laws admit of it (which I doubt as they now stand) the appointment of the Auditor's first clerk to act as Auditor in his stead will be a conveniency. I do not think this would be liable to the same objections as the appointing a clerk to act as Comptroller, whose office imports the second trust in the department. In one sense, to appoint the Auditor to act as Comptroller, will comport best with the spirit of the constitution of the department. This is, that *the officer who is to settle* the accounts, by countersigning the warrants for receipts and payments, shall have an opportunity to observe their conformity with the course of business as it appears in

the accounts; and shall have notice, in the first instance, of all payments and receipts, in order to the bringing all persons to account for public moneys. This reason operates to make the Auditor, who is the coadjutor of the Comptroller in settlements, his most fit substitute *in this particular view.*" (Works of Hamilton, Vol. V, p.77.)

Subsequently defending himself against a charge of having violated the law in advancing salary to the President, he says:

"As between the officers of the Treasury, I take the responsibility to stand thus: The Secretary and Comptroller in granting warrants upon the Treasury are both answerable for their legality. In this respect the Comptroller is a check upon the Secretary. With regard to the expediency of an advance, in my opinion the right of judging is exclusively with the head of the department. The Comptroller has no voice in this matter. So far, therefore, as concerns legality in the issues of money while I was in the department, the Comptroller must answer with me; so far as a question of expediency or the due exercise of discretion may be involved, I am solely answerable. And uniformly was the matter understood between successive Comptrollers and myself. Also, it is essential to the due administration of the department that it should be so understood." (VII Hamilton, p. 548.)

SUPREME COURT OF THE UNITED STATES.

No. 900.

THE UNITED STATES, APPELLANT,

vs.

THE REAL ESTATE SAVINGS BANK, OF PITTSBURGH.

BRIEF FOR APPELLEE.

No. 901.

THE UNITED STATES, APPELLANT,

vs.

J. BARNETT & COMPANY.

BRIEF FOR APPELLEES.

W. H. MOORE, PRINT. NO. 511 ELEVENTH ST.

SUPREME COURT OF THE UNITED STATES.

No. 900.

THE UNITED STATES, APPELLANT,

vs.

THE REAL ESTATE SAVINGS BANK, OF PITTSBURGH.

BRIEF FOR APPELLEE.

Sec. 3220 of the Revised Statutes authorizes the Commissioner of Internal Revenue, on appeal to him made, and subject to regulations prescribed by the Secretary of the Treasury, to remit and refund all taxes erroneously assessed or collected.

Sec. 3228 provides that claims for refund must be presented to said Commissioner within two years next after the cause of action accrued.

One of the regulations of the Department requires that claims for refund be "presented" through the collectors of the respective districts.

July 10, 1878, the claimant in this case erroneously paid $972.69 internal revenue tax; and a claim for refund of this sum (in connection with a claim for a smaller sum paid at a later date) was presented, in strict conformity with the regulations above referred to, through the Collector at Pittsburgh, July 9, 1880, and in time to have been transmitted by the Collector to the Commissioner's Office in Washington before the expiration of the two years. The papers, however, did not reach said office in Washington until a few days after the two years had expired.

It has been the uniform practice in the Treasury Department to treat a claim, when thus filed by the claimant in conformity with the regulations, as not barred by Section 3228, even though, by accident in the mail or through neglect of the Collector, the papers as in this instance did not actually reach the Commissioner's Office in Washington until after the two years had elapsed.

In the present case the Commissioner and the Secretary both decided that the claim for $972.69 had been seasonably presented, and it was accordingly approved by the Secretary and "allowed" by the Commissioner in the usual form. The certificate of allowance was for $1753.32, which included the sum of $972.69 now in dispute. This allowance being forwarded through the usual channels, for payment, reached the First Comptroller. That officer refused to "certify" the amount of the Commissioner's certificate, and "disallowed" the allowance to the extent of

$972.69, on the ground that this portion of the claim was barred by Sec. 3228; and that the Secretary and the Commissioner had erred in deciding otherwise.

On an action in the Court of Claims to recover the amount thus disallowed by the Comptroller, the Court were unanimously of opinion that claimant was entitled to recover, and judgment was rendered accordingly.

Three questions thus fairly arise which, *if still regarded as open* questions, it will be of public utility to have definitely settled. They will be considered in order:

I.

Where the Commissioner of Internal Revenue, in the exercise of powers conferred upon him by Section 3220 of the Revised Statutes, decides upon the merits of a claim and certifies his allowance thereof, and the allowance has been approved by the Secretary of the Treasury, is it conclusive upon the accounting officers of the Department, in the absence of fraud, mistake, or error in computation? or may the decision of the Commissioner and the Secretary be reviewed and reversed by the accounting officials through whose hands the allowance must pass, in department routine, prior to the actual issue of a draft?

1. The language of the act in question affords the most conclusive answer:—

> SEC. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected. * * *

It will be observed that there is no mention of the Comptroller here; it is the Commissioner alone, subject only to the Secretary's regulations, who is empowered to remit and refund.

Other statutes confer authority equally broad for kindred purposes, (Rev. Stat. 3379, 3426; sec. 6, act Mar. 1, 1879, 20 Stat., 327;) and, from the establishment of the internal revenue system, it has been the uniform policy of Congress to invest the Commissioner with large and extensive powers. He alone has the absolute and unqualified power of *making all assessments* of internal revenue taxes throughout the United States. (Sec. 3176, 3182, 3309, 3371, 3437, 3440.) He is, therefore, of necessity more familiar with all matters pertaining to assessment and collection than any other officer of the Government; and hence the *propriety* of committing to him the incidental duty of deciding upon matters of remission and refunding, in case of errors which he may have committed, is too obvious for argument.

2. In this connection it must be observed that section 3220 confers power both to "remit" and "refund." The former applies to taxes which have been assessed, but *not* collected; the latter to taxes which have been assessed *and* collected. Both powers are *equally* conferred; and, if discretion as to one class of cases is vested in the Commissioner solely and absolutely, it is difficult to see why the same is not true of the other also.

Now *it is a fact*, of which this Court may perhaps take judicial notice, that, in practice as well as under the law, the Commissioner's action in the matter of the *remission* of erroneous assessments is absolutely final and conclusive upon the Executive branch of the Government; and it has always been so. Yet this is a power of equal dignity with the power to "refund;" it is conferred side by side in the same section with the power to "refund;" and practically it is by far the more important of the two.

So far therefore as section 3220 is concerned, the powers are equally *unqualified;* and it is illogical to contend that Congress meant to confer absolute power to decide in matters of "remission," and only a limited and greatly impaired power to decide in matters of "refund." But, if the exercise of the latter power is subject to revision and nullification in any or all cases by the accounting officers, then the power is greatly impaired and the language of the statute is shorn of a large part of its natural force and effect.

3. There is nothing in the objection that the Commissioner cannot literally "pay back"—in the sense of handing money over a counter. By hundreds of acts of Congress, public and private, the Secretary of the Treasury is directed to "pay" various sums to different claimants. As a matter of fact, however, in all such cases the actual transfer of the cash is made by the *Treasurer*. Yet it cannot be doubted that the duty, and in some instances the discretion, in such cases, is vested solely in the Secretary—just as in the matter of refunding taxes we contend that it is vested in the Commissioner.

4. The Comptroller contends that sections 191 and 269 of the Revised Statutes impliedly vest him with powers to *undo* all that the Commissioner is specially authorized by section 3220 to do. If this be true, then the *harmony* of the statutes is destroyed; and a controlling principle of construction is sacrificed.

On the other hand, the Commissioner and the Secretary hold, and the Attorney General held, that the duties of the accounting officers are to be exercised in subordination to the rights and with a due regard to the discretion specially vested by law in other officers.

This seems to us to be the more reasonable doctrine. Any other theory must be prolific of endless trouble and discord. At the same time it does not derogate in any way from the Comp-

troller's authority in matters of *accounting*, in which his action is undoubtedly conclusive upon other executive officers. In the present case, for instance, no question of computation or accounting was involved. It was a mere question of allowing, or not allowing, a particular claim for a given and undisputed amount, in a case which the Commissioner of Internal Revenue was specially authorized to adjudicate and in which he had made his award.

5. Of course the Comptroller had the *physical power* to refuse to certify the account; and without his certificate the Treasurer could not pay the allowance. But the important question is whether, *in such a case*, the Comptroller is *legally justifiable* in exercising his physical power in this way? We contend that under section 269 of the Revised Statutes the Comptroller was only authorized to examine the "account," and not to have undertaken to review all the original facts upon which the Commissioner based his decision.

If, by virtue of sections 191 and 269, the Comptroller has an implied authority to review the evidence upon which the Commissioner has acted in making an award under section 3220, *then he has the same implied power to review the evidence upon which a final judgment of the Court of Claims is based, and to refuse to certify it for payment in case he disagrees with the conclusions of the Court.*

Such judgments, even when affirmed by the Supreme Court, are subjected to the same process of accounting, preliminary to the issuing of a draft, as are the allowances of the Commissioner of Internal Revenue or the adjudications of any other judicial or *quasi*-judicial tribunal. The statutes authorizing the Court of Claims to hear and determine causes are no more pregnant in their terms than those empowering the Commissioner of Internal Revenue to remit and refund.

II.

Was the decision of the Commissioner, approved by the Secretary, actually a sound one upon the facts as stated? and are the regulations and the practice of the Department, upon the subject of the presentation of claims, reasonable and proper?

The Court below were unanimously of opinion that the decision was sound and that the regulations and practice were reasonable and proper. It would be superfluous to supplement the logical and conclusive reasoning of the opinion upon this point. Moreover, the wisdom and propriety of the Commissioner's decision is not disputed in Appellant's brief; and the case from 6 Wall., 101, cited by the Court below, bears so directly upon the question of limitation and the presentation of claims here involved, as to leave little room for doubt that the principles under-

lying the Commissioner's decision are sound, and certain to meet the approval of this Court.

III.

Did the allowance of the Commissioner under Section 3220 constitute a *prima facie* case for the claimant in the Court below?

Notwithstanding that the whole argument for appellant is virtually directed to this question, we deem it no longer open to discussion. It was *settled* in the affirmative by the Kaufman case, (96 U. S., 570,) and the doctrine has since been repeatedly acted upon in the Court of Claims and acquiesced in by the Attorney-General. That case is not distinguishable in any material respect from this, and the Court there said:

> "To say the least, the allowance of a claim under this statute is equivalent to an account stated between private parties, which is good until impeached for fraud or mistake.
>
> It is not the allowance of an ordinary claim against the government by an ordinary accounting officer, but the adjudication by the first tribunal to which the matter must by law be submitted.
>
> Until so submitted, and until so adjudicated, there is not even a *prima facie* liability of the government; but when submitted, and when allowed upon the adjudication, the liability is complete until in some appropriate form it is impeached."

It would be a work of supererogation to re-argue a doctrine which has thus been so wisely and firmly established.

A few considerations, however, are noteworthy—

1. To hold that the Commissioner's adjudication does not constitute a *prima facie* case for the claimant, or that the *prima facie* is destroyed by the adverse action of the Comptroller, is in effect to *oust the jurisdiction of the Court of Claims in all of this class of cases;* and hence in many such cases to deprive the claimant of any remedy in a court of law. For, under the decision in the Nicoll case (7 Wall., 122,) the Court of Claims has no jurisdiction of an action for the recovery of a tax on its original merits; and, in such a case as this, it is only by virtue of the implied contract to pay the Commissioner's allowance that the jurisdiction of the Court is sustained.

If, therefore, the Commissioner's allowance does not constitute such an implied contract, or if its effect is nullified by the Comptroller's refusal to certify the balance, then the Court of Claims is without jurisdiction, the claimant is without a remedy, and the supremacy of the Comptroller is absolute.

That no such sweeping effect was ever *intended* to be annexed to the Comptroller's action is conclusively shown by the very section of the Revised Statutes from which the Comptroller derives his greatest dignity:—

troller's authority in matters of *accounting*, in which his action is undoubtedly conclusive upon other executive officers. In the present case, for instance, no question of computation or accounting was involved. It was a mere question of allowing, or not allowing, a particular claim for a given and undisputed amount, in a case which the Commissioner of Internal Revenue was specially authorized to adjudicate and in which he had made his award.

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"SEC. 191. The balances which may from time to time be stated by the Auditor and certified to the heads of departments by the Commissioner of Customs or the Comptroller of the Treasury, upon the settlement of public accounts, shall not be subject to be changed or modified by the heads of departments, but shall be conclusive upon the executive branch of the government, and be subject to revision only by Congress or the proper courts." * * *

Under this section it is clear that, while the Comptroller's action (whether right or wrong *per se*) is undoubtedly conclusive upon executive officers in the settlement of accounts in department routine, it is always open to revision in the proper courts and is absolutely without any conclusiveness there. That the Court of Claims is a "proper court," within the meaning of this section, is also a matter no longer open to discussion.

2. In this connection it should also not be overlooked that most of the Att'y General's opinions relating to the Comptroller were rendered before there was a Court of Claims with power to enter judgment, and when, therefore, the Comptroller's decisions were in most cases *practically* conclusive against the claimant, because there was no Court in which he could enforce his legal rights. But the Court of Claims is a tribunal specially designed to afford a remedy in the case of disputed claims and to review judicially the acts of the accounting officers.

To hold, therefore, that the Comptroller's refusal to pass an account can, in effect, deprive the claimant of his right to have his case decided in that Court, would be equally abhorrent to our sense of justice and contrary to the letter and spirit of the law. It is because this would certainly be one of the incidental effects of the theory contended for by the Appellant that it has been deemed worthy of mention.

3. Again. As Section 269 of the Revised Statutes contains the law upon the subject of the Comptroller's powers as it existed prior to 1868, the Jones' case, (18 How., 92,) may be said to have settled the *status* of that officer *under the then existing law;* and settled it adversely to the Comptroller's pretensions. The only subsequent legislation on the subject is contained in Section 191 above quoted; and that, as we have seen, expressly provides that the Comptroller's balances may be revised by the proper Courts.

Hence, it having been decided by this Court that nothing in the language now found in Section 269 vests the Comptroller's balances with conclusiveness upon the Courts, and Section 191 expressly providing for their revision by the Courts, there is now no margin whatever upon which to base an argument for any such conclusiveness as is virtually contended for by counsel for Appellant.

J. W. & G. L. DOUGLASS,
for Appellee.

No. 901.

THE UNITED STATES, APPELLANT,

vs.

J. BARNETT & CO.

BRIEF FOR APPELLEES.

Section 6 of the Act of March 1, 1879, (20 Stat., 327,) provides:

"That whenever * * an assessment shall have been made against a distiller for a deficiency in not producing eighty per centum of the producing capacity of his distillery * * * and it shall be made to appear to the satisfaction of the Commissioner of Internal Revenue that said deficiency * * * * was not occasioned by any want of diligence or by any fraudulent purpose on the part of the distiller, but from misunderstanding * * or by reason of unavoidable accidents, then, and in such case, the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal made to him, to remit or refund such tax, or such part thereof as shall appear to him to be equitable and just in the premises."

Application having been made by the claimants to the Commissioner for relief under this section, he deemed that it would "be equitable and just in the premises" to refund the sum of $446.99; the Secretary of the Treasury approved that decision; and the Commissioner certified his allowance of this sum in favor of the claimants. The First Comptroller apparently entertained a different view of what would be equitable, and refused to permit the allowance to be paid.

There is no room for argument here. Either Congress by this Act meant to confer, and did confer, upon the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary, sole and absolute power to decide upon the merits of the particular class of cases described in the act; or the English language has lost its meaning and there is no longer any recognized standard of interpretation.

In our view, the Comptroller's refusal to permit payment in this case was an assumption of power without a shadow of justification or excuse; and we are willing to submit the case without further comment.

J. W. & G. L. DOUGLASS,

for Appellees.

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JURISDICTION

OF THE

AUDITORS AND COMPTROLLERS

OF THE

TREASURY OF THE UNITED STATES,

IN THE

ADJUSTMENT OF PUBLIC ACCOUNTS.

GIDEON & Co., Print.

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OPINION

OF THE

SECOND COMPTROLLER OF THE TREASURY,

ON A

CLAIM OF ALEXIS COQUILLARD,

ASSIGNEE OF JOSEPH BERTRAND,

FOR A DEBT AGAINST

THE POTAWATTOMIE INDIANS,

INVOLVING QUESTIONS IN REGARD TO THE

JURISDICTION

OF THE ACCOUNTING AND OTHER OFFICERS OF THE GOVERNMENT, IN THE ADJUSTMENT OF PUBLIC ACCOUNTS.

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TREASURY DEPARTMENT,
SECOND COMPTROLLER'S OFFICE,
February 10, 1851.

PHILIP CLAYTON, esq., *Second Auditor*.

SIR: I herewith return the papers connected with the claim of Alexis Coquillard, assignee of Joseph Bertrand, which claim had been disallowed by you, and an appeal taken to this office.

The allowance of the claim having been urged upon this office in a written argument of able counsel, on the ground that the approval of the claim by the Commissioner of Indian Affairs was of binding authority on the accounting officers, and could not be disregarded by them without invading the just powers of the President and the Secretary of the Interior, both of whom the Commissioner is alleged to represent in his action on the claim; I have thought it necessary to examine somewhat fully into the respective jurisdictions of these several officers over the subject of claims on the Government. The importance of the subject of inquiry will account for the unusual length of the opinion which accompanies the papers returned.

You will perceive that I concur with you in disallowing the claim, and affirm your decision.

Very respectfully,

HILAND HALL, *Comptroller*.

OPINION.

TREASURY DEPARTMENT,
SECOND COMPTROLLER'S OFFICE,
February 10, 1851.

Alexis Coquillard, as assignee of Joseph Bertrand, having presented a claim to the Second Auditor, it has been disallowed by him, and an appeal taken to the Second Comptroller. The claim is founded on a written instrument purporting to have been signed by eighteen Indians in the presence of four witnesses. The writing is of the following tenor:

"CARRY MISSION RESERVATION,
August 10, 1837.

We, the undersigned chiefs and headmen of the Potawattomie tribe of Indians, hereby certify, that we have examined and had explained to us the account of Joseph Bertrand, senior, against us, and against the Indians of our respective bands, and are satisfied that the accounts are correct, and that the Indians of said tribe are honestly indebted to the said Joseph Bertrand in the sum of *five thousand two hundred and twenty-nine dollars* and three cents, which amount we hereby request the agent of the United States to pay to the said Joseph Bertrand."

Accompanying the writing are the affidavits of four persons, whose names appear upon it as witnesses, to the effect that the chiefs and headmen whose names are appended to the instrument, signed it by their marks, fully understanding the purport and object of it. There is also proof that the claim has been duly assigned by Bertrand to the claimant Coquillard.

This is all the evidence. But if proof were adduced that the consideration for which the instrument was executed was a just indebtedness of the Potawattomie tribe to Bertrand, and also that the Indians who executed it were headmen and chiefs, who had competent authority to bind the tribe by such an obligation, such additional evidence would not alone, in my opinion, authorize the accounting officers to admit the claim.

The instrument thus authenticated would at most be but evidence of a debt in favor of the claimant against the Potawattomie tribe of Indians, with perhaps a request of the tribe for the United States to pay it. There being no fund in the treasury specifically appropriated to the payment of the debts of the Potawattomie Indians, and no authority in the accounting officers to make the debt of the Indians a debt of the United States, their duty being merely judicial, it would manifestly be beyond their authority to direct the payment of it.

The claim has, however, been approved by the Commissioner of

Indian Affairs, whose action upon it is shown by the following endorsement, viz:

"Respectfully referred to the Second Auditor for settlement. The request herewith, of the authorities of the Potawattomie nation, for the payment out of their annuities of the claim of J. Bertrand, amounting to $5,229 03, being hereby sanctioned, payment to be made to the person or persons legally authorized to receive the same, charging the appropriation for fulfilling treaties with the Potawattomies. Act 30th September, 1850.

L. LEA, *Commissioner*.

OFFICE INDIAN AFFAIRS, 17*th January*, 1851.

This approval of the claim by the Commissioner of Indian Affairs, it is insisted, in behalf of the claimant, is binding upon the accounting officers, making it their imperative duty to allow it, and to charge the payment to the appropriation designated by the Commissioner. It is claimed that the acts of the Commissioner are to be considered as the acts of the Secretary of the Interior; that the jurisdiction of the Secretary, who represents the President, is over Indian affairs supreme, at least so far as the accounting officers are concerned; and consequently, that whatever claim the Commissioner adopts and approves, it is the duty of those officers to allow, and that they have no power to inquire into the propriety or legality of the allowance.

In support of this view of the limited power of the accounting officers, a long and labored written argument has been filed with the Comptroller by the counsel for Coquillard, in which the opinions of several attorney generals are referred to and relied upon as sustaining the doctrine contended for.

The earnestness and ability with which the doctrine is set forth and maintained seem to justify, and indeed to demand, a full and deliberate examination of it. If the counsel are right in their view of the respective powers of the Commissioner and the accounting officers, it is decisive in favor of the claim; if they are wrong, the question whether the approval of the Commissioner makes it a valid claim, remains open for consideration in this office. It, therefore, seems necessary that this preliminary question of jurisdiction should be met and decided.

The following extract from the argument of the counsel shows the ground on which the authority of the Commissioner is maintained:

"As the law has given the Commissioner of Indian Affairs *exclusive* jurisdiction over all matters relating to Indian affairs, it follows, *ex vi termini*, that every decision which he makes upon the matter, which is not reversed by the Secretary, is as much binding upon the accounting officers as if it had been made by the Secretary of the Interior himself. And the reason is this, because, as Judge Berrien says, *he is presumed always to act by the direction of the President*. The law makes it his *duty* so to act. It expressly requires the President and Secretary to prescribe the regulations which shall govern him. They have prescribed these regulations, and the Commissioner acts in all things, in

accordance with them. Suppose *they are in violation of law*, can the Second Auditor, or any other accounting officer, disregard or set them aside? Have the accounting officers *any* power *whatsoever* over the acts of the Executive? The very statement of the proposition shows how fallacious a contrary mode of reasoning must be."

Now, I utterly deny that the Commissioner of Indian Affairs, the Heads of the Departments, or even the President himself, has any such power over the accounting officers, as is claimed by the counsel. On the contrary, I maintain, that when an account or claim comes before the accounting officers for settlement or allowance, by whomsoever it may have been recommended, they have not only the power, but that it is their imperative duty, from which they cannot escape without a violation of their official oaths, to inquire into its legality, and if they deem its allowance illegal, to reject it. I further maintain, that in the system of accountability prescribed by our laws, the authority to judge of the legality of expenditures made by or under the direction of the heads of departments, was conferred on the Auditors and Comptrollers, with the design and intention that it should be exercised, and should operate as a check upon unnecessary and improvident expenditures.

I admit that the doctrine insisted on by the counsel in this case does receive apparent countenance from the language used in an opinion of Attorney General Berrien, in another of Attorney General Butler, and more especially in an opinion of Attorney General Johnson, which is in the following words:

ATTORNEY GENERAL'S OFFICE,
19*th April*, 1849.

SIR: The opinion of the Secretary of the Interior directing the claim of H. Laselle for $2,224\frac{75}{100}$ against the Miami nation of Indians to be paid, is, in my judgment, *binding upon all the subordinate officers by whom the account is to be audited and passed.* This has been the practice of the Government from its origin, and is as well authorized by the law organizing the departments, as it is absolutely necessary to the proper operation of the Government.

I deem the point so clear that I feel it to be unnecessary to refer to opinions upon the question given at different times by this office.

I have the honor to be, &c.,
REVERDY JOHNSON.

Hon. W. M. MEREDITH,
Secretary of the Treasury.

I venture to say, in the outset, that this opinion put forth with so much confidence is utterly untenable by either argument or authority; that there has been no such continued practice of the Government as the opinion refers to—that the law organizing the departments gives no countenance whatever to such a doctrine—and that the weight of authority of former Attorney Generals, is altogether different from what the opinion indicates.

The leading idea which seems to pervade the argument of the counsel in this case, as well as that of Attorney General Johnson, appears to be that there *must be*, and therefore is, some lurking undefined power in the Heads of Departments derived from the President which entitles them to control the acts of all officers of the Government, whose grade and rank are deemed inferior to theirs. I do not understand that there is any such Executive power.

It is one of the fundamental principles of our Government, that the President, like any other individual, is responsible to the laws. He can no more do an illegal act with impunity than any other citizen. That his instructions to an inferior Executive officer to do an act not authorized by law, will be no justification to such officer for doing it, is the well known settled law of the land. Instances are numerous in which such inferior officers have been made liable as trespassers, though acting under the express orders of the Executive Departments. Little *vs.* Barveme, 2 Cranch's R., 170. Tracy *vs.* Swartwout, 10 Peters, 280. It must, therefore, be very apparent, that the power of the Executive over inferior officers is not necessarily to be considered as unlimited.

The Constitution indeed makes it the duty of the President "to take care that the laws he faithfully executed;" but that does not confer on him the power to perform duties himself, or by his agents, the Heads of Departments, which the law has specially confided to other inferior officers. Thus, it will not be pretended that the Head of a Department, or the President, could control the judicial acts of one of the judges of the circuit court for the District of Columbia; and his authority over the official acts of a justice of the peace for the District, would be equally powerless. The power of the President, or the Head of a Department, representing him, over the acts of an officer, does not depend upon the supposed rank or grade of the officer, but *upon the law* conferring authority on such officer.

The Supreme Court in the case of Kendall *vs.* The United States, 12 Peters' R., 610, use the following language in regard to the power of the Executive:

"The executive power is vested in a President; and as far as his powers are derived from the Constitution, he is beyond the reach of any other Department, except in the mode prescribed by the Constitution through the impeaching power. But it by *no means* follows, that every officer in *any* branch of that Department is under the exclusive direction of the President. Such a principle, we apprehend, is not, and certainly cannot be, claimed by the President.

"There are certain political duties imposed upon many officers in the Executive Department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that Congress cannot impose upon any Executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and his duty and responsibility in such cases grow

out of, and remain subject to, the control of the law, and not to the direction of the President."

The question, then, whether the Head of a Department, (who, within the proper sphere of his Department, is, I admit, presumed to exercise the powers of the President,) is authorized to control the action of the accounting officers in the adjustment of claims, is to be determined not by any vague notions of undefined Executive power, but by the laws of Congress applicable to the duties of those officers.

The acts in force which provide for the settlement of public accounts are those of September 2, 1789, and March 3, 1817.

The act of September 2, 1789, which is entitled "An act to established the Treasury Department," declares that the officers of the Department shall be a Secretary of the Treasury, to be deemed head of the Department, a Comptroller, an Auditor, a Treasurer, a Register, and an Assistant Secretary of the Treasury.

It is made the duty of the Auditor (sec. 5) "to receive all public accounts, and after examination to certify the balance, and transmit the accounts, with the vouchers and certificate, to the Comptroller for his decision thereon;" and it is provided "that if any person whose account shall be so audited be dissatisfied therewith, he may, within six months, appeal to the Comptroller against such settlement."

It is made the duty of the Comptroller (sec. 3) "to examine all accounts settled by the Auditor, and certify the balances arising thereon to the Register;" and the duty of the Register (sec. 6) is declared to be "to receive from the Comptroller the accounts which shall have been *finally adjusted*, and to preserve such accounts with their vouchers and certificates."

By the further provisions of the act, which it is unnecessary to recite in detail, the Register was to furnish the Secretary with copies of the Comptroller's certificates of balances, and the moneys found due were to be drawn from the Treasury by warrants from the Secretary, countersigned by the Comptroller, and recorded by the Register.

This completed the system for the adjustment and payment of public accounts. They were first to receive the examination and approval of the Auditor; and were then to be revised by the Comptroller. A dissatisfied claimant might appeal from a decision of the Auditor to the Comptroller; but no appeal is provided for from the Comptroller. On the contrary, the accounts after receiving his revision are declared to have been "*finally adjusted.*"

The act of March 3, 1817, entitled "An act to provide for the prompt settlement of accounts," provides (sec. 2) "that from and after the third day of March next, all claims and demands whatever, by the United States or against them, and all accounts whatever in which the United States are concerned, *shall be settled and adjusted in the Treasury Department.*"

It is difficult to conceive how, in the face of this statute, declaring that accounts shall be settled and adjusted in the Treasury Department,

a Secretary of War or of the Interior is to acquire an authority over their settlement and adjustment.

The act of 1817 preserves the system of auditing and revision of accounts established by the act of 1789, adding to the officers provided for by that act four Auditors and one Comptroller. All accounts arising in the War and Navy Departments are to be examined by the Second, Third, and Fourth Auditors, and revised by the new or Second Comptroller; and all other accounts are to be under the jurisdiction of the First and Fifth Auditors and First Comptroller. The duties in regard to the preservation of accounts that have been adjusted, which by the act of 1789 had been conferred on the Register, were by this act, so far it regarded the accounts arising in the War and Navy Departments, transferred to the Auditors who were charged with their settlement; and the act (sec. 5) makes it the duty of such Auditors "to receive from the Second Comptroller the accounts which shall have been *finally adjusted*, and to preserve such accounts, with their vouchers, certificates," &c.

By the act of February 24, 1819, the settlement of accounts arising out of Indian affairs, with the exception of those appertaining to Indian trade, was transferred from the Fifth to the Second Auditor, who, in the language used in former acts, is directed "to receive from the Comptroller the accounts that shall have been *finally adjusted*, and to preserve such accounts with their vouchers and certificates."

There are numerous acts of Congress in which special powers are conferred on others than the accounting officers, in a manner indicating very clearly the understanding of Congress, that but for such provisions the adjustments of the accounting officers would be conclusive.

Thus, by act of February 21, 1823, "the proper accounting officers of the Treasury" were authorized "to adjust and settle the accounts and claims of Daniel D. Tompkins, late governor of the State of New York, on principles of equity and justice, *subject to the revision and final decision of the President of the United States*."

Again, by the act of March 1, 1823, in the settlement of accounts of persons remaining charged on the books of the Third Auditor with public moneys advanced prior to the first of July, 1815, "the proper accounting officers" were authorized to admit credits on such evidence as would be received in courts of justice; and it was provided, that whenever, in the settlement of such accounts, a difference of opinion should arise between the accounting officers, the case should be referred to the Secretary of War, whose decision should be conclusive. The accounts which were thus to be settled had all arisen in the War Department, and the Secretary, according to the argument furnished in this case, ought to have had perfect control over these accounts, without any special provision to that effect. Congress do not appear to have so understood it; and the provisions conferring on the President the power of revision in the act for the relief of Gov. Tompkins, and on the Secretary in this act, seem quite conclusive, that without such

provisions they would have had no such power. Many other acts of legislation of a similar character might be referred to, but I deem it unnecessary to pursue this branch of the argument further. The language of the acts of Congress relative to the duties and powers of the accounting officers of the treasury, appears to me to establish, beyond doubt or controversy, so far as the executive officers of the Government are concerned, their exclusive and final jurisdiction in the settlement of claims and accounts.

If the power of the President and Heads of Departments to control the accounting officers in the allowance of accounts were to be decided upon the authority of the opinions of former Attorney Generals, such power would not be sustained, as I shall now proceed to show.

In 1823 Congress passed an act directing "the accounting officers of the Treasury Department to settle and adjust the account of Joseph Wheaton while acting in the Quartermaster's department, upon the principles of justice and equity." Mr. Wheaton was dissatisfied with the adjustment of the accounting officers and applied to the President for relief, who referred his application to the Attorney General. Mr. Wirt, who then held the office of Attorney General, examined the subject fully, and under date of October 20, 1823, gave an elaborate opinion that the President had no power to interfere in the matter. The result of Mr. Wirt's examination is thus summed up by him:

"My opinion is, that the settlement of accounts of individuals by the accounting officers appointed by law is final and conclusive, so far as the Executive department of the Government is concerned. If an individual conceives himself injured by such settlement, his recourse must be to one or the other two branches of the Government—the Legislative or Judicial. If a balance be found against him, by the disallowance of credits which he deems just, he may refuse payment and abide a suit; in which case he will have the benefit of the opinion of a court and jury. If a balance be found in his favor, but smaller than he thinks himself entitled to, his appeal is to Congress, where the representatives of the people will pass upon his claim." Opinions of Atty's Gen., 471, 475.

On the 17th of January, 1824, on the application to the President, by Joshua Wingate, to have a sum passed to his credit in the settlement of his accounts at the Treasury, Mr. Wirt, referring to his former opinion in the case of Major Wheaton, advised the President that he had no right to interfere in the settlement of the accounts. Opinions, ibid., 479.

Again, on the 27th of July, 1824, on reference to him by the President, of an application by Elbert Anderson to have a credit allowed him in the settlement of his accounts as Army contractor, Mr. Wirt reaffirmed his former opinion as follows:

"I beg leave to call your attention to an elaborate opinion which I had the honor to address you on the 20th of October last, in the case of Major Joseph Wheaton, who sought to draw from you some instructions to the accounting officers relative to the settlement of his accounts. In

that case, after reviewing fully the organization of the accounting department; after scanning, with care, the language of our laws in relation to the operations of that department; after looking at the nature of the office of the President of the United States, the character of the duties devolved upon him, and the utter impossibility of his sitting in appeal over the accounting officers of the Government, or superintending and directing their operations, I gave it as my opinion, that he had nothing to do with the settlement of public accounts, either in the form of direction to accounting officers *a priori*, or revision and reversal *a posteriori;* that his interference with this business, so far from being required by law, *would be a usurpation on the part of the President*, which the accounting officers would not be bound to respect, except it were (as in the case of Gov. Tompkins) expressly ordered by the particular law to act under the direction and orders of the President." Opinions of Att'ys Gen., 506.

Subsequently on the 19th February, 1825, on applications of Gen. Hull and of Col. McKenney to the President, in relation to their several accounts, Mr. Wirt, referring to his former opinion in the case of Maj. Wheaton, advised the President that the accounts were matters which belonged exclusively to the accounting officers of the Government, and with which he had nothing to do. Ibid., 528.

The next opinion in the order of time which appears to have a bearing upon the question under consideration, is that of attorney general Berrien, dated December 4, 1829, and which is relied upon as sustaining the position assumed by the counsel for the claimant in the present case. Ibid., 740.

The question submitted to Mr. Berrien grew out of a claim of General Parker for double rations, and for fuel and quarters as adjutant and inspector general of the Army. The claim for *double rations* had been rejected by the accounting officers, and the judgment of the Supreme Court had also been against the claim. 1 Peters' Reports, 393.

It had been presented again to the accounting officers in the shape of an allowance for *fuel and quarters*, rejected by the Third Auditor, and an appeal taken to the Comptroller. When Mr. Hill was appointed Comptroller, he found the account in the office, with an endorsement of his predecessor upon it, which he was disposed to consider as an allowance of the claim. The Third Auditor declined to treat the claim as adjusted, and refused to pass the amount to General Parker's credit. Mr. Hill, through the Secretary of War, asked the opinion of the Attorney General, whether the decision of the late Comptroller was final or might be reopened, and if reopened, whether General Parker was entitled to the allowance claimed?

Mr. Berrien thought the facts stated were not sufficient to enable him to determine whether the account had been finally adjusted by the Comptroller or not; but he held, that if so adjusted the account was subject to be reopened by the Secretary of War acting under the authority of the President. He derived this authority of the Secretary from the provision in the statute requiring him to issue requisitions for

the balances certified to him by the Comptroller. "When the account has been settled and certified to the Secretary, he is then" says Mr. Berrien, "to issue his requisition for the amount; and unless he is a mere machine, or liable to the control of his own or the subordinates of another department, he must be entitled, before he does so, to *review*, and if need be, to *reverse the decision of the Comptroller*."

As this is the only statute provision that has ever, to my knowledge, been cited as conferring the power of revision of public accounts on the Head of a Department, it may be worth while to look more closely into it.

Mr. Berrien commences the above statement with a very important error of fact. He speaks of the *account* being settled and certified to the Secretary, as if, when he was called upon to issue the requisition he would have the *account* before him, and might look into it to ascertain whether it was proper to grant the requisition. But the statute makes no such provision. By the act of March 3, 1817, sec. 5, the *Auditor* receives from the Comptroller the accounts with the vouchers; and the Comptroller certifies to the Secretary, (sec. 9,) not the *account* that has been settled by him, but merely "the *balance arising thereon*." The accounts are not, either in contemplation of law or in practice, sent to the Secretary. Surely, if Congress had intended to confer on him the power of looking into the accounts to determine the propriety of issuing requisitions, they would at least have furnished him with the means of doing so. By looking back to the act of 1789, it will be found that the Secretary of the Treasury, who was required to draw warrants for the balances found due by the accounting officers, was left in no better condition than the Secretary of War is at present, to judge of the propriety of the adjustment. By that act, the accounts and vouchers were to be transmitted by the Comptroller to the Register, and the only papers to be furnished the Secretary, from which he could grant requisitions, were *copies of the certificates of balances*, which copies were to be furnished him by the Register. Sec. 6. But additional light may, perhaps, be thrown on this matter by going still further back, to the foundation of our system of accounting; which was the ordinance of the old Congress, "for regulating the Treasury and adjusting the public accounts," adopted Sept. 11th, 1781, 3 Journals Cong., 666. That ordinance provided for precisely the same officers that were constituted by the act of 1789, the head of the office in the ordinance being denominated Superintendent of Finance, instead of Secretary of the Treasury. The duties of the several officers were also similar. In fact, the act of 1789 only continued in operation the old system that had been in existence under the ordinance from 1781. By that ordinance, the Comptroller was to transmit the account when finally adjusted to the Register, to be entered of record with this further provision, viz., "and a *note of the balance* shall be certified by the Comptroller to the superintendent of Finance, *to make out the proper warrant for payment*." It seems very clear, that under this ordinance the issuing the warrant for payment was deemed a necessary consequence of the final adjustment of the account, and that the act of issuing it was merely ministerial, conferred on the Superintendent to

guard against irregular drafts on the Treasury, which might be apprehended if the same officers who settled the accounts were also allowed to draw warrants for their payment.

Under our system of paying claims out of specific appropriations, I should think the Secretary would be justified in refusing a requisition, if he were satisfied there was no appropriation to which it could be properly charged; and if there be any other ground on which payment of an adjusted claim might be legally refused, I should suppose the Secretary, on discovering it in any case, might properly decline to issue the requisition. This, I am disposed to think, was the extent of the power designed to be conferred on him. But, if it were intended he should exercise a discretion in regard to the issuing of requisitions, to be governed by his opinion of the justice and propriety of the allowances, and thus possess an absolute negative upon the payment of accounts, it would not by any means follow, as Mr. Berrien seems to suppose, that he might go the long stride further, of reversing the allowance and re-adjusting the accounts. If Congress had designed that the power of revision of the settlements of the Comptrollers should be exercised by the Heads of the Executive departments, they would assuredly have provided for an appeal from his decisions, as they did to him from those of the Auditors. But, when the law expressly provides that all accounts in which the United States are concerned "shall be settled and adjusted *in the Treasury Department*," when the adjustments of the Comptroller are declared to be final, and not an intimation is found in any act of Congress that there could be any appeal from his decisions, or any revision of them, it would be adopting a latitudinarian construction, which, I apprehend, the learned Attorney General would not, on reflection, feel bound to maintain, that such power of revision is, nevertheless, conferred on the Secretary of War, by the mere authority to draw requisitions in payment of balances which have been certified to him from the office in which the accounts have been adjusted.

We next come to an opinion of Attorney General Taney, given April 5, 1832, on reference to him by the President, of a memorial of General Taylor, in which he enters into a very full examination of the question, whether the settlement of an account, made by the proper accounting officers of the Government, could be reviewed by the President. The result of his examination is summed up in the concluding part of his opinion, as follows:

"These laws, as well as those which preceded them on the same subject, appear to me not to contemplate any appeal to the President, and I think, therefore, that the decision of the Comptroller in this case is conclusive upon the Executive branch of the Government, and that the President does not possess the power to enter into the examination of the correctness of the account, for the purpose of taking any measures to repair the errors which the accounting officers appointed by law may have committed. The party who supposes justice has not been done to him must seek relief in court when a suit is brought against him, or may bring his claim to the consideration of Congress; and

those, in my opinion, are the only means of redress left to General Taylor, if the accounting officers have erred in their decision." Opinions, 871–2.

On the 31st of May, 1832, in the case of Gen. Gratiot; and again, on the 18th day of December following, in the case of Mr. Hogan, on reference to him by the President, Mr. Taney, referring to his former opinion in the case of Gen. Taylor, on each occasion advised the President that he had no power to interfere in any way in the settlement of public accounts. Opinions, 877 and 895.

So much for the opinions of the present Chief Justice of the Supreme Court.

The next opinion, in the order of time, is that of Attorney General Butler, which is cited and relied upon by the counsel in the written argument before mentioned.

This opinion of Mr. Butler, which is dated May 17th, 1834, was given in reference to the same claim, which some years previously had elicited the before mentioned opinion of Mr. Berrien. Ibid., 956.

Subsequent to the time of Mr. Berrien's opinion there had been no further approval of the claim by the Comptroller, but General Parker had succeeded in procuring sundry endorsements upon his papers of Secretaries of War, which were more or less favorable to the allowance of the claim; and General Cass, then Secretary of War, requested the opinion of the Attorney General, whether the acts and decisions of the former Secretaries and Comptrollers were sufficient to authorize and require the accounting officers to settle and allow the account.

Mr. Butler, apparently without any knowledge of the previous opinions of Mr. Wirt and Judge Taney, and manifestly without examination of the question, treated Mr. Berrien's opinion as the law of the case, and held that the doings of the former Secretaries of War were sufficient to authorize and require the accounting officers to settle and allow the claim.

This opinion was not, however, carried into effect, but was successfully resisted by Mr. Thornton, the then Second Comptroller. On being furnished with the opinion by the Secretary of War, Mr. Thornton addressed a letter to him, under date of June 5, 1834, embodying at length the two leading opinions of Attorneys General Wirt and Taney, before referred to, and protesting that the Secretaries of War had no power to allow the claim; that it was unfounded in law, and ought not to be admitted.

The attention of the President having been called to the matter, he, on the 8th of July, 1834, transmitted to the Secretary of War an order, as follows, viz:

"The Secretary of War will suspend further proceedings on the claim of General Parker until I return. In the mean time he will call on the Attorney General for a full consideration of the whole case.

ANDREW JACKSON."

"July 8, 1834."

It does not appear that the Attorney General gave any further opinion on the subject. The presumption is that he became satisfied that the position taken by the Comptroller was correct; for no further attempts appear to have been made to coerce him into the allowance of the claim, and General Parker at the next session presented his petition to Congress for relief. The petition having been referred to the Committee of Claims of the House of Rrepresentatives, an unfavorable report was made upon it February 2, 1835, by Mr. Banks, from that committee, that committee giving a history of the claim, with copies of the endorsements of the Secretaries of War, the letter of Mr. Thornton, and other papers connected with the claim thereto appended. See reports of committees, 2d session, 23d Congress, No. 77.

That Mr. Butler afterwards became satisfied that the opinions of Mr. Berrien and himself were erroneous, is shown by a subsequent opinion given by him in another case, which appears wholly inconsistent with those opinions.

By the provisions of the Post Office act of 1825 the Postmaster General was to receive the income and make the expenditures of the Post Office Department, and to render an account of the same to the Treasury, "*to be adjusted and settled as other public accounts.*" In a labored opinion of Mr. Butler, given October 10, 1835, in the case of Stockton and Stokes, it became important to inquire and determine the extent of the Postmaster General's accountability under the provisions of that act, the extent of his accountability being measured by that which governed the settlement of other public accounts at the Treasury. After considering the matter with care, Mr. Butler did not come to the conclusion that, because the Postmaster General was the head of a department, and represented the Executive in the management of the affairs of the post office establishment, the accounting officers had no power to inquire into the legality of his acts. He sums up his conclusions on that point as follows:

"Whenever the accounting officers can see by the face of the account, or by the vouchers produced in its support, that moneys have been paid by the Postmaster General in cases or for purposes not authorized by law—and, still more, when they perceive that such payments were directly contrary to law—it will be their duty to disallow them, and to hold the Postmaster General a debtor to the Government for the amount. In the case of moneys paid for additional allowances, a rule is given, by the act of Congress, which the accounting officers may and ought to apply to every credit of this nature claimed in the account. If they discover that the rule prescribed by law has been violated in the allowance, I do not see how they can pass the payment to the credit of the Postmaster General without a palpable dereliction of duty." (*Opinions*, 1024.)

I have now noticed all the opinions of Attorneys General that I am aware of, having reference to the present subject of inquiry, and I think it must be admitted that their authority is decisive against the powers of

the Heads of Departments to interfere in any way whatever with the accounting officers on the adjustment of claims and accounts.

The power of the President and Heads of Departments to direct or review the decisions of the Comptrollers of the Treasury will, I apprehend, be also found to be altogether unsustained by practice.

During the administration of Mr. Monroe and Mr. Adams, the doctrine so clearly and explicitly stated by Attorney General Wirt appears to have been uniformly adhered to. Gen. Jackson, who was not apt to shun responsibility that belonged to him, fully acknowledged his want of authority over the accounting officers in the settlement of claims. Peebles and Gorham, contractors for supplies in the Subsistence department, being dissatisfied with the final adjustment of their account by the Second Comptroller, applied to the President for relief, who referred the application to the Secretary of War, by whom, through the Commissary General, a report was made July 1, 1835. The opinion of President Jackson, in his own original autograph, is found endorsed on the papers in the Third Auditor's office, as follows:

"The report made—Attorney General's opinion referred to. The decision of the Second Comptroller is final, over whose decisions the President has no power, except by removal. The Secretary of War will make known this decision to Mr. Peebles.

A. J."

It will be perceived that this decision, in July, 1835, was more than a year after Mr. Butler's opinion in Gen. Parker's case; and that Gen. Jackson, instead of recognising that opinion as law, recurs back to the earlier opinion of Judge Taney, which fully sustains the doctrine of his decision, that he had no power over the accounting officers except that of removal from office.

The practice of Mr. Van Buren's administration is understood to have corresponded entirely with that of Gen. Jackson on this subject.

In October, 1841, during Mr. Tyler's administration, application was made to him by Clements, Bryant & Co., to have the opinion of the Attorney General requested in regard to a decision of the Second Comptroller on their claim. Mr. J. C. Spencer, then Secretary of War, to whom the matter was referred, in a report to the President, expressed his full approbation of the opinion of Attorney General Wirt, of October 20, 1823, and advised the President that "the accounting officers of the Treasury constituted a judicial tribunal," from whose decision there was no appeal to the President or the Secretary of War; that, as the Comptroller had not asked the opinion of the Attorney General, and would not be bound to regard it when given, the request ought to be denied. The report of the Secretary of War was approved by the President, and both the report and approval were printed in the form of a circular for the information of claimants and public officers.

During Mr. Polk's administration, an application was made to him to interfere with the adjustment of the same claim, which he declined to do, making his endorsement on the papers, as follows:

"I have considered the application in the case to open the accounts of Bryant, Clements & Co., and decline to interfere upon the ground that Congress has expressly given the authority to settle the claims to the accounting officers of the Treasury Department, and that I have no right to control these officers in the performance of their duty. August 9, 1845.

J. K. POLK."

I am not aware that the present Chief Magistrate of the United States, or any of the Heads of Departments, claim the power of direction or revision of public accounts, or have indicated any desire to exercise such power.

I cannot but feel that the argument and authorities which have already been adduced in favor of the conclusive jurisdiction, so far as the Executive officers of the Government are concerned, of the accounting officers of the Treasury over public accounts, must be entirely convincing and satisfactory. Yet the fact that the doctrine has so recently been assailed with great confidence in an official opinion of an Attorney General, and that it is maintained in the present case with earnestness and ingenuity by able and learned counsel, must be my apology for pursuing the subject somewhat further.

It appears to have been a leading principle in the system of accounting established by the act of 1789, that the auditing and revision of accounts should be made by officers holding their appointments independent of the Heads of Departments, and wholly unconnected with the disbursements of the public moneys; it being deemed essential to the judicious and economical administration of the financial affairs of the Government, that the officers who directed an expenditure, should not also judge of its legality. Hence, the adjustment of accounts by the accounting officers was declared to be final, and was designed to be so.

This system was, however, broken in upon in some degree, when the superintendence of the collection of the revenue, in consequence of the duty having become too burdensome to the Secretary of the Treasury, was, in 1792, transferred to the Comptroller. Under this arrangement, the Comptroller was sometimes called upon to revise accounts for expenditures which he had himself directed. This has, however, always been deemed a defect in the system requiring correction.

In December, 1834, when Mr. Woodbury was Secretary of the Treasury, he, in compliance with a resolution of the Senate, prepared and reported to that body a plan for the re-organization of the Treasury Department. In that report he speaks as follows of this anomaly in the system of accounting, and what was desirable in such a system.

"A legal and proper check in the passing of accounts is not now supposed to be had by the First Comptroller, in respect to some accounts which may occasionally, though seldom, grow out of any of his own previous decisions or directions, as superintendent of the customs;

and it is manifest, that no effectual check can ever exist in any case where the same officer authorizes the expenditure and audits or controls the audit of the accounts." Senate Documents No. 6, page 5, 2d sess., 23d Congress. See also "an inquiry into the practicability of symplifying the system of public accounts, by P. G. Washington, Jan. 1832." Ex. Doc., 2d sess., 24th Congress, No. 71. This defect in respect to the duties of the First Comptroller has recently been corrected by transferring the superintendence of the collection of the revenue to the Commissioner of Customs.

In one branch of the Government, the practical operation of a system of accounting, which gave to the Head of a Department the direction of the expenditures, and also the control of the audit of them, has been tested by experience. I refer to the Post Office Department. It was, indeed, provided by the act of March 3, 1825, that the Postmaster General should, "once in three months, render to the Secretary of the Treasury a quarterly account of all the receipts and expenditures in the Department, to be adjusted and settled as other public accounts." But as all the payments were to be made by the Postmaster General previous to their being submitted to the accounting officers, and as the examination of the accounts at the Treasury could not be speedily made, but in fact became several years in arrear, the accounting answered no useful purpose whatever. The power of the Postmaster General over his expenditures was practically unchecked and unlimited.

The effect of this uncontrolled power of expenditure upon the financial management of the Department is well known. The expenditures became lavish and improvident in the extreme, not to say fraudulent and corrupt; and the Department was only saved from actual bankruptcy by a legislative examination and exposure of its affairs, and the subsequent appointment of a new and more economical and efficient head.

It seems to have been the concurrent opinion of legislators and statesmen of both political parties at the time, that the wasteful and extravagant expenditures of the Department were in a great degree chargeable to the want of that legal check upon its disbursements, which the system of accounting at the Treasury furnished to the other Departments of the Government.

On the 9th of June, 1834, the Senate Committee on the Post Office and Post Roads, who had been specially charged to examine into the condition of the Post Office Department, made report by Mr. Ewing, their chairman, which was very unfavorable to the Department, and scribed the derangement of it affairs "to the uncontrolled discretion exercised by its officers over its contracts and funds." Mr. Grundy and Mr. Robinson, constituting a minority of the committee, made a separate report less unfavorable to the Department, but recommended "that the Department be re-organized in such a way as to secure a proper degree of responsibility not only in the head, but in the subordinate branches of the Department; and for that purpose the auditing of the accounts and *the final adjudication of them*, and the disbursements of

its moneys, should be confided to officers appointed by the President and Senate."

Senate doc., 1st sess., 23d Cong., No. 422, pages 31 and 274.

The attention of the President of the United States having thus been brought to the subject, he, in his annual message, in December, 1834, adopted the suggestions of the minority of the committee, and recommended that the Post Office Department "be re-organized, with an auditor and treasurer of its own, appointed by the President, who should be branches of the Treasury Department."

The committee of the Senate having further pursued their investigations during the recess of Congress, made their final report, by Mr. Ewing, their chairman, on the 27th of January, 1835. The report, after speaking of the numerous great abuses and evils which had grown up in the Department, proceeds as follows: "They may be principally traced to the absolute and unchecked power which a single individual holds over the resources and disbursements, and all the vast machinery of the Department. The checks of various inferior officers upon each other are of no value, *when all are guided and controlled in their acts by one dominant will.*" * * * * *

The committee recommended "a change in the organization of the Department, so as to place the collection and the disbursement of its funds in different hands, and under the control of officers entirely independent of each other." "That Department," say the committee, "as at present arranged, is a dangerous anomaly in our system; and by whomsover its concerns are hereafter to be conducted, its organization ought to be changed, so as to conform more nearly to that of the other great Departments of the Government." Senate Doc., 2d sess., 23d Cong., No. 86, page 89.

Mr. Kendall, who had become postmaster general, in his annual report of December 4, 1835, strongly urged a re-organization, by law, of the financial branch of the Department. After speaking of several defects in the then existing system, he proceeds as follows:

"There is another feature in which the present organization of the Department is defective and unsafe. It is believed to be a sound principle, that public officers, who have an agency in originating accounts, should have none in their settlement. The War and Navy Departments are in general organized upon this principle. In the orders, contracts, and regulations of the Heads of those Departments, or their ministerial subordinates, issued and made in conformity with law, accounts originate; the moneys are generally paid by another set of agents, but partially dependent on the Heads of the Departments; *and the accounts are finally settled by a third set who are wholly independent of them.* If from any cause an illegal expenditure be directed by the Head of a Department, it is the duty of the disbursing agent not to pay the money; and if he does pay it, *it is the duty of the Auditors and Comptrollers to reject the item in the settlement of his account.* * * * The most important improvement required is to separate the settlement of accounts entirely from the Post Office Department, and vest it in an

auditor appointed by the President, with the advice and consent of the Senate." Ex. Doc., 1st sess., 24th Cong., No. 2, page 399, 400.

In pursuance of the foregoing recommendations, the act of July 2, 1836, entitled "An act to change the organization of the Post Office Department, and to provide more effectually for the settlement of the accounts thereof," was passed; which act provided for a separate auditor for that Department, who was authorized to settle all accounts accruing in the Department, subject to an appeal by either the Postmaster General, or the claimant, to the First Comptroller, whose decision was to be final.

Having, I think, satisfactorily shown by reference to the several acts of Congress on the subject, that neither the President nor Heads of Departments have any authority to direct or control the accounting officers in the adjustment of claims and accounts, and no authority to review their decisions, and that the jurisdiction of the accounting officers over such claims and accounts is final and conclusive upon all the Executive officers of the Government, and was designed to be so; that such jurisdiction, with one or two ill-advised exceptions, has been generally acknowledged and vindicated by the law officers of the Government, and is also sustained by long established practice; and that the public interest requires and demands that such jurisdiction should be preserved and maintained, I leave this branch of the subject without further remark.

I do not intend by any thing that has been said to intimate that the accounting officers are not, in any case, to regard the action of the Heads of Departments upon claims and expenditures. On the contrary, I admit and hold, that in all that large class of cases in which a legal discretion is committed to the Head of a Department, either as such, or as the proper organ of the President, the decision of such Head of Department, within the limits of his discretion, would be binding upon the accounting officers. It would be binding on them, not because of any jurisdiction in the Head of the Department over them in the adjustment of claims, but because their official duty requires them to admit and allow all claims which are legal, and the approval and direction of the Head of Department being in such case by authority of law, would make the expenditure a legal one.

Thus, in the case of the present claim, if the Secretary of the Interior had endorsed upon it his approval, and direction to have it paid out of the appropriation for the payment of the annuities to the Indians, and the claim were thus presented to the accounting officers for settlement, the first inquiry for their consideration would be, whether the Secretary had authority thus to direct the payment of the debt of the Indians out of the money appropriated by Congress in satisfaction of their annuities. If the accounting officers came to the conclusion that he had no such authority, it would be their duty to reject the claim. If they held that the direction of such payment was a matter within the authority of the Secretary, they would not inquire whether he had exercised his discretion judiciously, but would regard his act as making

the expenditure a legal one, at least to the extent of the real debt against the Indians.

The claim not appearing to have been acted upon by the Secretary of the Interior, it remains to be considered whether the approval and direction of the Commissioner of Indian Affairs makes it a valid one, upon the appropriation for the payment of the Indians' annuities.

It is insisted in the argument of counsel before mentioned, that the Commissioner of Indian Affairs, by virtue of his office as such Commissioner, has authority to decide upon the legality and propriety of all claims arising in the Indian department, and that his decision upon such claims is of binding authority on the accounting officers. This power is, in the first place, claimed to have been specially conferred by the third section of the act of 1832, which directs the Commissioner to make "administrative examination" of all accounts and vouchers for claims and disbursements connected with Indian affairs, previous to his passing them "to the proper accounting officer of the Treasury for settlement."

It seems quite apparent that the Secretary of War, who in obedience to the direction of the President prescribed the regulations of 1836, and which are still in force, for conducting this examination, did not understand it as superseding the authority of the accounting officers over the claims. The "administrative examination" is treated throughout those regulations as being preliminary, and in aid of the examination which is subsequently to take place at the Treasury. Thus, by the first paragraph of the 5th regulation, it is provided, that when the Commissioner deems a claim to be "*illegal*," or contrary to the regulations or instructions, or improper and unjust, "he will withhold his sanction, and state his objection for the *consideration of the accounting officers*." By the second paragraph of the same regulation, the Commissioner is directed, after making an examination of the circumstances of any expenditure, "to annex such explanatory observations as may *the better enable the accounting officers to perform their duty*;" and the third paragraph provides that "where particular instructions authorizing the service or expenditure have been given, *and are necessary to a just decision of the matter, the proper extracts therefrom* will be transmitted by the Commissioner with the accounts."

These regulations appear to be entirely inconsistent with the idea that the examination of accounts and vouchers by the Commissioner, and his sanction or disapproval of them, was understood to constitute an allowance or disallowance, which was to be regarded as such by the accounting officers. The term "administrative examination," is believed never to have been understood as constituting a final adjustment of a matter, but to be applicable only to such preliminary examinations of accounts and expenditures as are made in the several bureaus of the Departments, for the purpose of promoting the due administration of the affairs under the direction of the bureau, and in aid of the subsequent examination by the accounting officers. Such examinations of accounts and vouchers have long been made in the several bureaus of the

War Department, such as the quartermasters', the medical, the engineers', and other bureaus, and have never been claimed or recognised as having a binding authority on the accounting officers. That such is the meaning of the term "administrative examination," will be seen by reference to Regulations of the Army, 1825, paragraph 299; Regulations of 1841, quartermasters' and other administrative departments; Regulations of 1847, page 185, note; also Mayo's Treasury Department, Supplement, page 116 to 120.

It is further insisted by the counsel for the claimant that the Secretary of the Interior, succeeding to the powers of the Secretary of War, had *legal authority* to direct the payment of the claim out of the annuity appropriation; that the Commissioner of Indian Affairs, in approving and directing the payment of the claim, is to be considered as representing the Secretary of the Interior; and that the Commissioner consequently had all the power over the subject that might have been exercised by the Secretary. For that reason it is urged that the decision of the Commissioner made the claim *a legal one*, and that it therefore ought to be passed by the accounting officers.

Whether the power of the Commissioner over the subject matter of this claim was co-extensive with that of the Secretary, must be determined by the laws and regulations.

The act of July 9, 1832, constituting the office of Commissioner of Indian Affairs, gave him the general management of Indian affairs and relations, "under the direction of the Secretary of War, and agreeably to such regulations as the President might from time to time prescribe." By the subsequent act, passed June 30, 1834, entitled "an act to provide for the organization of the department of Indian Affairs," the duties and powers of the officers of the department were more particularly defined, and by the 17th section the President was authorized "to prescribe such rules and regulations as he might think fit, for carrying into effect the various provisions of the act." This act, as well as the regulations of the President for carrying it into effect, contains many special provisions by which some powers are conferred on the President, some on the Secretary of War, and others on the Commissioner.

The authority of the Commissioner to direct the payment of the present claim, if it exists, must be found in the laws and regulations in regard to the payment of Indian annuities; for it is out of the annuities due the Indians by treaty, and out of the appropriation made by Congress for the payment of them, that the money is directed to be taken.

From the examination which I have made of the subject, I am of opinion that the discretionary power of determining the manner in which Indian annuities shall be paid, within the limits in which there is room for discretion, has by the laws and regulations been committed to the Head of the Department, and not to the Commissioner.

By the 11th section of the act of June 30, 1834, it is provided "that the payment of all annuities or other sums stipulated by treaty to be made to any Indian tribe, shall be made to the chiefs of such tribe, or

to such person as said tribe shall appoint; or if any tribe shall appropriate their annuities to the purpose of education, or to any other specific use, then to such person or persons as such tribe shall designate.

And by section 12 of the same act it is further provided, "that it shall be lawful for the President of the United States, at the request of any Indian tribe to which any annuity shall be payable in money, to cause the same to be paid in goods."

Regulation No. 30, of June 1, 1837, for carrying into effect the provisions of this act, is as follows, viz:

"The 11th section of this act permits any tribe to appropriate their annuities to the purpose of education, or to any other specific use. But the exercise of this privilege is dependent on the discretion of the Executive, and no appropriation of any part of their annuities can be made by a tribe under this section, *without the express sanction of the Department of War.*"

It will therefore be seen that no authority is given to the Commissioner, by the 11th or 12th sections of the act of 1834, to exercise any power whatever over the subject of the payment of annuities. Under the 11th section no tribe can make any appropriation of their annuities to any specific purpose "*without the express sanction of the Department of War;*" and by the 12th section no tribe can be permitted to receive their money annuities in goods, *but by direction of the President.*

I am not aware that there is any other act of Congress bearing on this question, except the 3d section of the act of March 3, 1847. That section, so far as it is applicable to the question now under consideration, is as follows:

"*And be it further enacted*, That the eleventh section of the 'Act to provide for the better organization of the Department of Indian Affairs,' approved June 30th, 1834, be, and the same is hereby, so amended as to provide that all annuities or other moneys, and all goods, stipulated by treaty to be paid or furnished to any Indian tribe, shall, *at the discretion of the President or Secretary of War*, instead of being paid over to the chiefs, or to such persons as they shall designate, be divided and paid over to the heads of families and other individuals entitled to participate therein; or, with the consent of the tribe, be applied to such purposes as will best promote the happiness and prosperity of the members thereof, under such regulations as shall be prescribed by the Secretary of War, not inconsistent with existing treaty stipulations."

It will be seen that the whole subject of the payment of Indian annuities, so far as this section is concerned, is committed to "the discretion of the President or Secretary of War;" the language, very clearly, as I think, excluding all idea that it could have been the intention of Congress to confer any authority whatever on the Commissioner.

I do not find that any regulations were issued by the President or Secretary of War for carrying into effect the provisions of this section, unless the instructions of the Commissioner of Indian Affairs to the officers of the Indian department, under date of August 30, 1847, are

to be understood as announcing such regulations. The following is an extract from those instructions:

"As the responsible guardian of the interest and welfare of the Indians, and in pursuance of the discretionary power vested in him by law, the President therefore directs that, hereafter, all annnities and other money and goods due the Indians be paid and distributed to heads of families, and to individuals without families, entitled to participate therein, unless a different mode of payment or distribution is expressly required by treaty stipulation; in which case, the views of the tribe in general council will be taken; and if the mode prescribed by treaty be insisted on, after a full explanation and due consideration, it will be adopted."

If this provision in the instructions of the Commissioner is to be considered as evidence of a regulation prescribed by the Executive for carrying the act into effect, as its language imports, it cannot, I think, be otherwise construed than as a positive prohibition against the appropriation of Indian annuities to any such purpose as that contemplated by the allowance of the present claim. But independent of this regulation, if it be one, there appears to me to be an entire want of authority in the Commissioner as such, to direct the disposition of the money appropriated for the payment of Indian annuities.

Whether the Secretary of the Interior, by virtue of the several acts of Congress which have been referred to, or of any other act, would have authority to direct the money appropriated by Congress for the payment of treaty annuities to be paid either wholly or in part to creditors of the tribe, is a question which I do not conceive arises in this case, and upon it I express no opinion.

I have now gone through, at much greater length than I at first intended, with an examination of the several questions arising out of this claim, and the grounds on which its allowance has been urged on this office. These questions, relating to the respective jurisdictions of the accounting and other officers of the Government, are questions of importance as well as of delicacy. I have no wish to claim any jurisdiction for the accounting officers that was not intended to be conferred on them by law, nor to deny any authority to any other officers of the Government that the law has confided to them. I have sought for the solution of these questions in the laws themselves, and have some confidence that I have arrived at correct conclusions. I shall, however, hold myself open to be convinced by argument, that my opinions are erroneous; and when thus convinced they will be cheerfully retracted and abandoned. Until then I hold it to be my duty to abide by and maintain them.

I concur with the Second Auditor that the claim ought not to be admitted, and affirm his decision disallowing it.

HILAND HALL,
Comptroller.